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NO. 86-

in the Supreme Court of the United States

October Term, 1986

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JOSEPH F. SPANIOL, JR.
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HUGHLAN LONG, S. DEWEY HAAS and CARL RASSLER, individually and on behalf of all retired and present male employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, as well as the surviving joint annuitants of any deceased retired male employees,

Petitioners,

vs.

THE STATE OF FLORIDA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WOODROW M. MELVIN, JR.
Counsel of Record
KEITH OLIN
CINDY NIAD-HANNAH
RUDEN, BARNETT, McCLOSKY,
SMITH, SCHUSTER
& RUSSELL, P.A.
One Biscayne Tower—Suite 2020
Miami, Florida 33131
(305) 371-6262

JEROLD FEUER
19 W. Flagler Street
Miami, Florida 33130

DAVID POPPER
7700 N. Kendall Drive
Suite 710
Miami, Florida 33156

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinion below directly conflicts with *City of Los Angeles, Department of Water and Power v. Manhart,* 435 U.S. 702 (1978) ("*Manhart*"); *Bazemore v. Friday,* ____ U.S. ____, 106 S.Ct. 3000 (1986) ("*Bazemore*"); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977) ("*International Teamsters*") and/or the requirements of the Equal Pay Act of 1963, 29 U.S.C. §206 ("Equal Pay Act") in awarding relief based on the "unisex" rate for males and the "female" rate for females where that rate fails to equalize the benefits received by class members and identically situated female retirees, and/or fails to treat pension benefits as "wages" under the Equal Pay Act.

2. Whether the opinion below directly conflicts with *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975) ("*Albemarle*") in failing to specifically hold as a matter of law that this employer was guilty of "bad faith" conduct which precluded it from asserting any equitable defenses to full relief for Plaintiffs.

3. Whether the opinion below directly conflicts with *Manhart* and *Bazemore* in denying damages for discriminatory benefits paid after *Manhart* to class members who retired prior to *Manhart.*

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STATUTES INVOLVED

This case involves §§703 and 706 of Title VII of the Civil Rights Act of 1964 as amended [78 Stat. 255 & 86 Stat. 109; 78 Stat. 259 & 86 Stat. 104]—42 U.S.C. §2000e-2(a)(1) and 42 U.S.C. §§2000e-5(g).

42 U.S.C. §2000e-2 provides in relevant part:

> (a) Employer practices. It shall be an unlawful employment practice for an employer—
>
> > (1) [t]o discriminate against any individual with respect to his compensation. . . or privileges of employment, because of such individual's. . . sex. . . . .

42 U.S.C. §2000e-5(g) provides in relevant part:

> Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders. If the court finds that the respondent has intentionally engaged in or is engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, . . . back pay. . . , or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

This case also involves the Equal Pay Act of 1963, 29 U.S.C. §206(d)(1) which provides:

Prohibition of sex discrimination

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The decision of the Eleventh Circuit (A. 1-23) is reported at 805 F.2d 1542. The judgment of the district court (A. 32-33), that judgment's underlying order (A. 34-35), and the two orders of March 31, 1986, and March 16, 1984, incorporated therein (respectively, A. 36-69 and A. 70-82) are not reported. All are reprinted in the Appendix hereto at the pages indicated.

JURISDICTION

Plaintiffs initially sought relief having a present value of $200 million under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.*), 42 U.S.C. §1983 and pendent state law claims. Plaintiffs invoked the district court's jurisdiction pursuant to 28 U.S.C. §1343 and its pendent jurisdiction over state claims. The district court dismissed Plaintiffs' §1983 and pendent state law claims (A. 73-74). Thereafter this case proceeded solely on Plaintiffs' Title VII claims.

Following the district court's $43,600,000.00 judgment (A. 32-33), defendants invoked the Eleventh Circuit's jurisdiction under 28 U.S.C. §1291, and Plaintiffs subsequently cross-appealed. The Eleventh Circuit granted a stay, consolidated the two appeals, and expedited the case. (A. 31).

On December 19, 1986, the Eleventh Circuit rendered its decision (A. 1-24) and Plaintiffs' petition for rehearing was denied on February 19, 1987 (A. 24-25).[1] The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1]The Eleventh Circuit's denial of rehearing is reported at 805 F.2d at 1552.

PARTIES TO THE PROCEEDING

The Plaintiff class is comprised of two sub-classes. Subclass 'A' consists of retired male employees of the State of Florida, its agencies and political subdivisions who retired after March 24, 1972 and before August 1, 1983, and who elected to receive their benefits under options providing joint and/or survivor benefits to the retired employee and another person designated as a joint annuitant or beneficiary. (A. 37). Subclass 'A' also includes the surviving joint annuitant or beneficiary of a deceased male retiree who would otherwise be a class member. (A. 37). Subclass 'B' consists of males presently employed by the State of Florida, its agencies and political subdivisions and who are vested in the Florida Retirement System (FRS). (A. 37). Only the claims for Subclass 'A' are involved in this appeal.

The employer/Defendants are the State of Florida, its agencies and political subdivisions, and various appropriate officials of state government. (A. 37). The State of Florida is an employer for purposes of Title VII. (A. 38).

STATEMENT OF THE CASE

The facts described herein are either undisputed or taken from the extensive findings of fact and conclusions of law made by the learned trial judge and affirmed by the Eleventh Circuit Court of Appeals. The Plaintiff class accepts *all* the court's factual determinations. The jurisdictional conflict here urged pertains to certain conclusions of law reached upon those facts.

This is a class action suit seeking relief having a present value of approximately $200 million[2] (A. 46), brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5 for sex discrimination in the employer's administration of an employee retirement plan. Specifically, Plaintiffs claimed that the employer's use of sex based mortality tables (i.e. separate mortality tables for males and females) which provided greater monthly retirement benefits to females (and their joint annuitants or beneficiaries) than to otherwise identically situated males (and their joint annuitants or beneficiaries) constituted unlawful sex discrimination. (A. 36).[3]

At trial, Plaintiff class established that the employer's use of the sex distinct mortality tables, resulting in smaller monthly benefit payments to men than to women, was a violation of Title VII. (A. 60-61). The district court further found that this was an

[2]Curiously, the $216 million "excess cash" appropriated in 1984 by the legislature to create monies to pay any "unexpected increases" in pension debts (A. 21, 97), is almost equal to the $200 million sought by Plaintiff's claim (of which $43.6 million has been awarded; the additional $157 million is sought by this Petition for Certiorari). The employer vigorously contends that this is mere coincidence.

[3]As has been true of all Title VII pension cases on sex discrimination, the greater life expectancy assumed for the female causes the discriminatory result. In *Long*, the male retiree and his female joint annuitant suffer due to the assumed greater life expectancy of the female joint annuitant. The employer has stipulated to the existence of this result. (A. 44).

employer-administered plan involving no "open market" issue and, thus, was controlled by this Court's 1978 decision in *City of Los Angeles, Department of Water & Power v. Manhart,* 435 U.S. 702 (1978) (*"Manhart"*) and not its 1983 decision in *Arizona Governing Committee For Tax Deferred Annuity And Deferred Compensation Plans v. Norris,* 463 U.S. 1073 (1983) upon which the employer relied as its alleged first warning and the catalyst of the alleged "emergency" elimination of the sex distinct rates for new retirees as of August 1, 1983. (A. 38, 61-62).

Since 1975, the plan has been funded by contributions paid by the employer and from investment returns on fund assets. (A. 42-43). The contribution rate is set by the legislature as a percentage of payroll and is changed from time to time as it wishes. (A. 54).

Prior to August 1, 1983, the FRS utilized separate "male" and "female" rates (mortality tables) to calculate retirement benefits under options 2, 3 and 4. (A. 9). Thus, while equal contributions were made for male and female employees, because of the use of these tables, a male retiree who selected an option which also protected his spouse during her life received a smaller monthly retirement payment than an otherwise identically situated female retiree who had chosen the same protection for her spouse. (A. 8-9, 42, 44). Subsequent to the commencement of this action (July 2, 1982), the FRS discontinued use of these sex distinct rates on August 1, 1983 for persons retiring after that date and, in their place, adopted "unisex" rates. (A. 9, 41-42). These "unisex" rates were derived by taking a weighted average of the male and female tables proportionate to

the number of male and female FRS members.[4] The result was a middle level of benefits, lower than those previously available at the "female" rate and greater than those previously available at the "male" rate; however, this rate was paid to employees only if they retired after August 1, 1983. (A. 9, 41-42). The 1983 conversion resulted in no additional cost to the FRS, since it merely involved a reallocation between men and women of existing benefit obligations. (A. 59).

However, for persons who retired *prior* to August 1, 1983, the employer continued to pay discriminatory benefits based upon the sex distinct rates and will continue to do so even under the remedy affirmed below unless this Court acts to correct the situation. Under the judgment affirmed by the Eleventh Circuit below, Plaintiff class members would receive monthly benefits increased from the "male" rate to the "unisex" rate, but the otherwise identically situated females continue to enjoy the higher "female" rate.

Even more than a year before this Court's decision in *Manhart* became known, this employer was aware of early E.E.O.C. rulings regarding the use of sex-based mortality tables. The FRS administrators, especially the State Retirement Actuary, questioned the legality of Florida's pension system and warned each other about

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[4]Literally and technically among actuaries, "unisex" only means the use of one rate for both sexes. Usually, "unisex" refers to a weighted average of the "male" and "female" rates of life expectancies. The one rate is applied to determine life expectancy for both sexes. (A. 8).

its implications. The record shows that this employer and its pension fund *consciously declined* to revise the FRS' sex distinct actuarial tables as early as 1976. By memorandum dated November 16, 1976, State Retirement Actuary Lawrence Gibney urged the then State Retirement Director, Robert L. Kennedy, Jr., (predecessor to the Defendant, Andrew J. McMullian, III) to *abandon* the sex-biased actuarial tables before 1977. (A. 101-108). The State Retirement Actuary *warned* that the Equal Employment Opportunity Commission would no longer permit sex-biased mortality standards. He further stated:

> I would not bring this to your attention if it were not for the *pressure of the Federal government via the EEOC to have equal benefits without regard to sex. Since our option factors make this distinction, it would seem prudent to resolve our course of action before the 1977 valuation is started.*
>
> * * *
>
> [*I*] *would recommend we consider* going to the new basis for option reduction factors *and resolve this differential in the benefits between the sexes once and for all.* (Emphasis added). (A. 107).

Obviously, this particular employer-operated pension fund had a current grasp of legal events in 1976, even prior to *Manhart.*

Some one and one-half years later, in April, 1978, this Court decided *Manhart.* On May 19, 1978, the State Retirement Actuary wrote another memorandum to the

pension fund director regarding the development of "unisex" factors and, referring to the *Manhart* decision, he warned:

> In light of the recent Supreme Court decision, *it is not a question of 'if' but 'when' we adopt such factors.* (Emphasis added). (A. 56-57, 109-110).

Three years went by with the illegal tables still in use. Then, the State Retirement Actuary issued another warning dated May 21, 1981, to the State Retirement Director, Andrew J. McMullian, III again recommending a change to a "unisex" table. (A. 115-116). It was specifically suggested by the State Retirement Actuary that *early* implementation be done *"to avoid any possible retroactive liability that may arise."* (A. 116). He further cautioned:

> If we were forced by a court order to a 'unisex' table, *it's conceivable we would have to make adjustments back to* [*the*] *date of the Manhart case which occurred in September* [sic] [April] *1978.* We would have to increase the male benefits but I have my doubts as to whether we would be successful decreasing the female benefits. Hence, *there could be a retroactive liability.* (Emphasis Added). (A. 116).

Still, the employer and its pension fund did nothing to implement a change to a non-discriminatory system. (A. 58).

State Retirement Director McMullian also acknowledged the risk that retroactive damages could be imposed back to the date of *Manhart* if "unisex" tables were not adopted. In his June 25, 1981 letter to

an administrator of another state's pension plan, the Director admitted that conversion to "unisex" rates was an "issue [that] is not going away. . ." (A. 121). This letter by the Director also admits that if the employer "were *forced* to make *retroactive adjustments,* the cost would be at least 3 times the amounts cited above, *based on the number of years elapsed since April 1978.*" (Emphasis added). (A. 123). Obviously, the reference to April 1978 was to the *Manhart* decision.

As of July 10, 1981, this employer was actively speculating about the risks of retroactive liability which might arise from a lawsuit exactly like this one. Division of Retirement Staff Attorney, Diane K. Kiesling, wrote a memorandum on that date to Mr. McMullian, wherein it was stated:

> The reasons for the Supreme Court's denial of retroactive relief in *Manhart* no longer exist and I suspect that retroactivity is going to start showing up in these types of cases in the future. . . .
>
> * * *
>
> There is no necessity for legislative action prior to adoption of so-called unisex tables. This change can be achieved solely by amendment of the FRS rules. (A. 126).

Still, the FRS took no action to abolish its sex-distinct mortality tables.

On September 1, 1981, David V. Kerns, General Counsel to the Department of Administration, received a memorandum from attorney Samantha Boge, a

member of his legal staff. In that memorandum it was stated, *inter alia*:

> *Using sex-distinct actuarial tables* resulting in higher monthly benefits for female retirees and their families than male retirees *violates Title VII in my opinion*, as surely as unequal monthly employee contributions. *While such use may be permissible by insurers generally, it is not permissible by employers like the State of Florida.* (Emphasis added). (A. 128).

Still, nothing changed. The employer's agents denied at trial that these written memoranda really meant what they said, and the employer contended that it had reasonably relied upon some oral legal advice from David V. Kerns which suggested that *Manhart* might not necessarily apply to the FRS. The district court rejected the reasonableness of this alleged reliance on Mr. Kerns stating:

> After hearing the evidence in this case, there is no longer doubt at all that the state was on notice *at least from the date of Manhart* that the use of sex-based mortality tables was impermissible. The court will emphasize its finding of March 16, 1984, by saying that *the state could not and did not reasonably assume that it could continue to use the sex-based tables.* (Emphasis added). (A. 61).

The district court also found that the employer's pension plan "refused" to make the change they knew to be required by *Manhart* because they "simply did not want to make the politically unpopular decision to reduce the females' benefits." (A. 61).

Class Plaintiff representatives, HUGHLAN LONG and CARL RASSLER, as well as class member N. LOUIS SAMAHA wrote FRS plan administrators threatening litigation if this situation was not corrected. Then they filed formal charges with the E.E.O.C. Through all of this, this employer did nothing to correct the plan. The other specific findings by the trial judge as to the conduct of this employer are several and rather pointed:

> Why the defendants thought the Supreme Court would change its mind after *Manhart* has never been explained; perhaps the defendants wanted a direct order from the United States Supreme Court to the FRS to change its policies. And yet, defendants never requested an opinion from the Attorney General of Florida nor even a declaratory judgment from this court or a state court. It is clear that the defendants refused to act on the misplaced assumption that there would be no retroactive damage award. *Manhart* states, almost naively, that 'there is no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision.' *Id.* at 720, 721. Unfortunately, in Florida that prophecy has proved incorrect. (A. 64).

As previously noted, it was not until August 1, 1983, about one year after the instant suit was commenced, that the Florida Retirement System, on an alleged "emergency" basis, finally adopted "unisex" tables as to new retirees. According to FRS policy, the "unisex" tables applied *only* to those persons retiring on or after

August 1, 1983, and this employer continued to pay discriminatory retirement benefits to all members of the Plaintiff class.

The Eleventh Circuit below affirmed all findings and conclusions by the trial judge.

The district court and the Eleventh Circuit, however, rejected the Plaintiffs' argument that this employer was not entitled to raise equitable defenses[5] because it had acted in "bad faith", defined in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975) ("*Albemarle*") as "maintaining a practice which [the employer] knew to be illegal or of highly questionable legality." Upon the facts stated above the district court concluded and the Eleventh Circuit agreed that Defendants' decision not to conform to *Manhart* was merely "poor judgment" but not bad faith. (A. 24-25, 63). Plaintiff class contends that this conclusion below is clearly erroneous.

In determining the method by which to calculate the award, the Court below held that an increase only to a "unisex" level was warranted for males even while the higher "female" rate would still be used for the females. Unless corrected pursuant to this Petition for Certiorari, this will result in male retirees still receiving a smaller monthly retirement benefit than females.

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[5]Such as not granting retroactive relief to pre-*Manhart* retirees for the discriminatory monthly payments received in the years *after* the *Manhart* ruling, and not equalizing pension rates between men and women due to the vested rights of the women.

Thus, the court below granted the following relief. As to all class members, the employer was directed to adjust all of the males upward to "unisex" rates from the date of the judgment forward. The present value of this portion of the award is approximately $32,265,000.00. (A. 68-69).

The court also awarded retroactive damages for the past underpayment of retirement benefits (an increase from the "male" rate to the "unisex" rate) from October 1, 1978 (*Manhart*) to the date of judgment, but only as to class members who retired after October 1, 1978. The amount of this award is approximately $12,800,000.00. (A. 69). The October 1, 1978 date was chosen by the district court because it concluded that this employer would have been reasonably entitled to five months within which to implement the April, 1978 *Manhart* decision. (A. 65). However, no retroactive relief for underpayments during this period were awarded to class members who retired prior to October 1, 1978. (A. 68-69). Approximately 5,000 of the 12,000 class members were thus denied retroactive relief.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW DIRECTLY CONFLICTS WITH *MANHART, BAZEMORE, INTERNATIONAL TEAMSTERS* AND/OR THE EQUAL PAY ACT IN AWARDING RELIEF BASED ON THE "UNISEX" RATE FOR MALES AND THE "FEMALE" RATE FOR FEMALES WHERE THAT RATE FAILS TO EQUALIZE THE BENEFITS RECEIVED BY CLASS MEMBERS AND IDENTICALLY SITUATED FEMALE RETIREES AND/OR FAILS TO TREAT PENSION BENEFITS AS "WAGES" UNDER THE EQUAL PAY ACT

The Eleventh Circuit affirmed the district court's decision to limit the award to the class to the "unisex" rate rather than to the "female" rate even though under this approach class members will continue to receive smaller monthly retirement checks than otherwise identically situated female retirees. In upholding this measure of damages, the circuit court stated, "Title VII does not require equalization; it only requires that plaintiffs be made whole," (A. 23); *i.e.* in the position that they would have occupied if the FRS had timely converted to unisex factors. Plaintiffs respectfully submit that the circuit court's interpretation of the "make whole" standard is fundamentally wrong because it perpetuates rather than eliminates the illegal discriminatory practices. As such, the decision below conflicts with several decisions of this Court which mandate absolute equality of benefits under these circumstances.

The award of relief at "unisex" rather than "female" rates is improper under general principles of Title VII, and further conflicts with decisions of this Court. Equality of economic relief is a simple mechanical function of applying an individual class member's age, average salary, years of service, etc. to the same female annuity tables used for his otherwise identically situated counterpart. Under the facts of this case, the remedy adopted does not provide economic equality and that is the purpose of Title VII; to the contrary, the use of the "unisex" rate for males, but a "female" rate for females, perpetuates the illegal discrimination. The decision below thus also conflicts with this Court's recent decision in *Bazemore v. Friday*, ___U.S.____, 106 S.Ct. 3000 (1986) (*"Bazemore"*) which held that Title VII required *equal* pay checks for similarly situated black and white employees. In *Bazemore* this Court characterized as "too obvious to warrant extended discussion" the principle that Title VII requires the elimination--not the perpetuation of discrimination. Title VII thus *does* require *absolute equality* in employment benefits between similarly situated persons of different race, sex, creed, religion or national origin.

The opinion below purports to rely expressly on *Manhart* for support, but this reliance is misplaced. Nothing in *Manhart* says or infers that the remedy for its facts (a "unisex" rate) would necessarily become the sole remedy for every other pension case or that a "unisex" rate could be used to create inequality instead of equality. Moreover, *Manhart* would prohibit the use of any remedy which sanctions and continues the same form of economic discrimination which provoked the "successful" litigation by the Plaintiffs in the first instance.

In the opinion below, confusion seems to have arisen between the mechanism, a sex-distinct mortality table, and the illegal result, discrimination in the pension check between comparable men and women retirees. The opinion below affirmed the elimination of the original *mechanism* ("male" rates and "female" rates), but replaced it with another discriminatory mechanism ("unisex" rates and "female" rates). If this new mechanism involved a single "unisex" rate and applied to *everyone* equally, no error would be involved here. But, this new mechanism, according to the opinion below, must continue to pay its female retirees at the "female" rate without doing the same for the males. This provides the employer with a "windfall" savings and has left an illegal result largely intact despite a clear ability of the employer to pay.[6]

Furthermore, that "equal pay for equal work" is a basic precept of Title VII cannot be questioned. This Court has often observed that Congress enacted Title VII to ensure "equality of employment opportunities." *E.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 348 (1977) (*"International Teamsters"*). In recognition of this principle the circuit courts have long held that the provisions of the Equal Pay Act, 29 U.S.C. §206, set the measure of damages in a Title VII sex discrimination case. In *Crabtree v. Baptist Hospital of Gadsden, Inc.*, 749 F.2d 1501, 1503

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[6]The court below affirmed that this pension fund has about $216 million in "excess cash" over and above the cash required to pay all future obligations and maintain the FRS on an actuarially sound basis. (A. 21). The award has a present value of about $43.6 million, the other relief has a present value of approximately $157 million. (A. 32-33). The total assets of the fund exceed $9 billion. (A. 38-39).

(11th Cir. 1985) the Court stated, "[t]he sex discrimination provisions of Title VII must be read in harmony with the Equal Pay Act. . . . Basing a backpay award under Title VII on a salary found to violate the Equal Pay Act would ignore both Title VII's purpose of making victims whole for economic losses suffered through past discrimination and the requirement that Title VII and the Equal Pay Act be read in harmony." Similarly, in *Orahood v. Board of Trustees of the University of Arkansas*, 645 F.2d 651, 654 n. 6 (8th Cir. 1981), the Court stated, "Under a pure claim of unequal pay for equal work, the standards of the Equal Pay Act apply whether the suit *alleges a violation of that Act or Title VII. See Gunther v. County of Washington*, 623 F.2d 1303, 1321 (9th Cir. 1979), *cert. granted*, ____ U.S. ____, 101 S.Ct. 1343, 67 L.Ed.2d 330 (1980). Where the claim is one involving inadequate compensation, but a comparison with equal work is not possible, Title VII may still provide relief." (Emphasis added). There can be no serious question that pension benefits are as much a part of compensation as salary and therefore constitute part of an employees "wages" within the meaning of the Equal Pay Act. *E.g. Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1081 (D.C. Cir. 1984); *Sylvania Electric Products, Inc. v. NLRB*, 291 F.2d 128 (1st Cir. 1961).

The Equal Pay Act flatly forbids relief which simply lowers the advantaged party to the level of the disadvantaged party and thereby creates "equality." As this Court stated in *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (*"Corning Glass"*):

[C]ongress required that employers pay equal pay for equal work and then specified:

> '*Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.' 29 U.S.C. §206(d)(1).'
>
> The purpose of this provision was to ensure that to remedy violations of the Act, '[*t*]*he lower wage rate must be increased to the level of the higher.*' H.R.Rep.No.309, *supra*, at 3, U.S. Code Cong. & Admin. News, 1963, p.688. Comments of individual legislators are all consistent with this view. Representative Dwyer remarked, for example, 'The objective of equal pay legislation . . . *is not to drag down men workers to the wage levels of women, but to raise women to the levels enjoyed by men in cases where discrimination is still practiced.*' Representative Griffin also thought it clear that '[*t*]*he only way a violation could be remedied under the bill . . . is for the lower wages to be raised to the higher.*' (Emphasis added) 94 S.Ct. at 2234.

The relief awarded by the district court and affirmed by the circuit court in this case plainly conflicts with the Equal Pay Act and this Court's decision in *Corning Glass*, as these principles are to be applied in a Title VII case. By awarding relief at the lower "unisex" rate

rather than the higher rate paid to identically situated females the Plaintiff class is still denied "equal pay for equal work." As noted in *Corning Glass*, the Equal Pay Act unequivocally requires that the lower benefits received by males be raised to the same level as benefits received by females. Relief which merely raised males' benefits to some middle level which is still less than females' benefits is insufficient and improper as a matter of law. The courts below simply failed to raise the disadvantaged Plaintiff class to the higher benefit level received by the advantaged female retirees as required by Title VII, the Equal Pay Act and *Corning Glass*. Thus, the decision below also directly conflicts with *Corning Glass*.

II. THE OPINION BELOW DIRECTLY CONFLICTS WITH *ALBEMARLE* IN FAILING TO SPECIFICALLY HOLD AS A MATTER OF LAW THAT THIS EMPLOYER WAS GUILTY OF BAD FAITH CONDUCT WHICH PRECLUDED IT FROM ASSERTING ANY EQUITABLE DEFENSES TO FULL RELIEF FOR PLAINTIFFS

Plaintiffs argued unsuccessfully that this employer was precluded from raising any equitable defenses to Plaintiffs' claims because it had acted in "bad faith" pursuant to this Court's decision in *Albemarle*. In *Albemarle*, this Court expressly held that ameliorating equitable considerations could come into play only where the employer has acted without bad faith:

> The District Court's stated grounds for denying backpay in this case must be tested against these standards. The first ground was that

> Albermarle's breach of Title VII had not been in 'bad faith.' This is not a sufficient reason for denying backpay. *Where an employer has shown bad faith—by maintaining a practice which he knew to be illegal or of highly questionable legality—he can make no claims whatsoever on the Chancellor's conscience.* But, under Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor. If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.' *Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent'* for 'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.' *To condition the awarding of backpay on a showing of 'bad faith' would be to open an enormous chasm between injunctive and backpay relief under Title VII.* There is nothing on the face of the statute or in its legislative history that justifies the creation of drastic and categorical distinctions between those two remedies.

422 U.S. at 422-23 (Emphasis added) (citations omitted).

However, the courts below failed to apply the *Albemarle* bad faith test of maintaining a practice known to be illegal or of highly questionable legality.

Instead, the district court applied a standard of "evil intent or design" (A. 63), and the circuit court one of "a specific intent to inflict injury." (A. 21). Not only are these not the standards prescribed by *Albemarle*, they are in direct and irreconcilable conflict with that decision. As quoted above, *Albemarle* expressly rejects the notion that bad faith requires "moral turpitude" which is inherent in the standards employed by the district and circuit courts below. *Albemarle* also expressly rejects the notion that the employer's "good intent or lack of discriminatory intent" negates a finding of bad faith. Thus, the bad faith standards applied by the courts below not only fail to conform to *Albemarle* but further are contrary to *Albemarle.*

As stated, under *Albemarle* an employer acts in bad faith for purposes of Title VII "by maintaining a practice which he knew to be illegal or of highly questionable legality." 422 U.S. at 422. The district court expressly found that following *Manhart* this employer "did not reasonably assume that it could continue to use the sex based tables," that it "turned a deaf ear to the *Manhart* message" and "refused to act" because it "simply did not want to make the politically unpopular decision to reduce the females' benefits." These findings were amply supported by documentary and testimonial evidence adduced at trial and clearly call for application of the *Albemarle* bad faith rule. Various FRS internal memoranda and legal opinions expressly acknowledged the need to conform to *Manhart* and the likelihood of retroactive damages for the failure to do so. It is impossible to conceive of a clearer example of *Albemarle* bad faith than is contained in the findings of the district court below. Based upon the district court's express findings, this employer knew, at the very least, that the

continued use of sex distinct tables after *Manhart* was "of highly questionable legality." This is *Albemarle* bad faith as a matter of law.

Thus, Plaintiffs respectfully submit that in failing to expressly find that the employer's bad faith precludes any equitable defenses to damages pursuant to *Albemarle*, this case is in conflict with *Albemarle*. Again, it is important to emphasize that Plaintiffs do not challenge any of the factual findings made by the district court. To the contrary, it is based upon the express factual findings of the trial court that Plaintiffs submit the district and circuit courts erred in failing to take the next step and hold that such conduct constituted bad faith as defined in *Albemarle*. Thus, not only did the courts below conflict with *Albemarle* in the standards of bad faith applied, under these express findings of fact the contrary conclusion reached below is also "clearly erroneous." *See Anderson v. City of Bessemer City, North Carolina*, ____ U.S. ____, 105 S.Ct. 1504 (1985).

III. THE OPINION BELOW DIRECTLY CONFLICTS WITH *MANHART* AND *BAZEMORE* IN DENYING DAMAGES FOR DISCRIMINATORY BENEFITS PAID AFTER *MANHART* TO CLASS MEMBERS WHO RETIRED PRIOR TO MANHART

Plaintiffs respectfully submit that in denying retroactive relief to class members who retired prior to October 1, 1978 but who were receiving retirement benefits in the years thereafter, the opinion below directly conflicts with this court's decision in *Manhart* and *Bazemore*.

There was no basis stated by the court, nor does any logical justification exist, to differentiate between pre- and post-*Manhart* retirees in this regard. The court correctly awarded both groups relief in the form of increases in future benefit payments.[7] Thus, the court necessarily and correctly found that each member of the entire class had suffered a Title VII violation. The court also found that it was appropriate to award retroactive damages back to the date of *Manhart* (as modified to allow time for implementation) as to the post-*Manhart* retirees. But, retroactive benefits should be available to all class members who were receiving underpayments of monthly benefits after *Manhart*, regardless of when they retired, and not just those who retired after October 1, 1978 (*Manhart*).

Nothing in *Manhart* says or infers that Title VII does not protect an employee from discrimination if his date of retirement occurred before the *Manhart* decision came down. Precisely the opposite, *Manhart* granted prospective relief to its claimants. Obviously, the prospective relief obtainable in 1978 must also be attainable today as retroactive relief.

From *Manhart* forward it was just as illegal to use separate "male" and "female" rates to calculate the current monthly benefits of pre- *Manhart* retirees as it was to use them in calculating the benefits of new, post-*Manhart* retirees. That practice remained just as illegal up to the date of the judgment in this case and it continues to be illegal today. Oddly, the opinion below recognizes this, in concept, by including the pre-*Manhart*

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[7]The relief granted, however, did not produce equality of benefits. See Point I herein.

retirees in the award of prospective relief from the date of judgment forward even though it denies them retroactive relief. There is nothing significant about the date of judgment herein which makes relief to this group available only from the date of judgment forward and not *Manhart* forward. To the contrary, *Manhart* is clearly the time from which to award relief to all members of the Plaintiff class.

As a result, the decision below is also in direct conflict with *Bazemore*. In *Bazemore*, the Supreme Court recognized Title VII does not permit state employers to perpetuate discriminatory employment practices which were not previously actionable. In *Bazemore* the North Carolina Extension Service discriminated against blacks with respect to salaries and promotions prior to and continuing after March 24, 1972 when Title VII became applicable to state employers. The Fourth Circuit held "the Extension Service was under no obligation to eliminate any salary disparity between blacks and whites that had its origin prior to 1972. . . ." 106 S.Ct. at 3006. The Supreme Court flatly *rejected* this conclusion, stating:

> The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. *A pattern or practice that would have*

> *constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, he is liable under that statute.* While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be imposed.
>
> *Each week's pay check that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.* The Court of Appeals plainly erred in holding that the pre-Act discriminatory difference in salaries did not have to be eliminated.

106 S.Ct. at 3006-07 (Emphasis added). The parallels are obvious and compelling. This employer and its pension plan also had the duty to eliminate its pre-existing practices of discrimination, if not in March, 1972, then as of *Manhart*. Moreover, this duty did not extend only to persons retiring after that date but also as to persons already retired. To allow the FRS to continue to pay unequal benefits to pre-*Manhart* retirees does not eliminate discrimination, it perpetuates it.

Indeed, the Eleventh Circuit correctly did conclude that each monthly underpayment after *Manhart* constituted a separate Title VII violation for the purpose of determining which class members would receive relief under the "300 day rule." It said:

> The discriminatory event here is not the date of retirement for each employee, as the FRS contends; rather, each month's disparate retirement check constitutes a separate actionable discriminatory event and therefore a continuing violation. *See Bazemore v. Friday*, ___ U.S. ___, 106 S.Ct. 3000, 3006, 92 L.Ed.2d 315 (1986); *Perez v. Laredo Junior College*, 706 F.2d 731, 733-34 (5th Cir. 1983); *cert. denied*, 464 U.S. 1042, 104 S.Ct. 708, 79 L.Ed.2d 172 (1984). As a result every retiree who received retirement benefits within 300 days of any of the EEOC charges is correctly within the class. 805 F.2d at 1546. (A. 11).

Although the Eleventh Circuit correctly applied *Bazemore* to the 300 day rule in the context above, it failed to apply it to the issue of whether pre-*Manhart* retirees should recover retroactive damages for the discriminatory monthly payments they received *after Manhart*.

This is precisely what *Bazemore* held was illegal under Title VII. Just like each week's smaller pay check to blacks was illegal, "regardless of the fact this pattern was begun prior to the effective date of Title VII," 106 S.Ct. at 3007, each month's smaller retirement check to *all* class members violates Title VII, regardless of the fact that such payments were already being made to some retirees prior to *Manhart*. The only difference is that the 1978 *Manhart* decision is the "effective date of Title VII" for purposes of this case rather than March 24, 1972. It is wrong to suggest that North Carolina could continue to pay disparate salaries to black employees hired before the effective date of Title VII and was obligated to pay equal salaries only to persons

hired thereafter. Yet, this is the exact situation presented in this matter. The pre-*Manhart* retirees are excluded from the retroactive relief granted to post-*Manhart* retirees.

Plaintiffs submit there is no reason to exclude class members who retired between 1972 and 1978 from any recovery allowed herein as to benefits paid from 1978 to the date of judgment. They are every bit as much the victims of their employer's past discriminatory employment practices as those who retired after *Manhart*. The same reasons which compel allowing retroactive damages to class members who retired after *Manhart* also justify awarding such damages to *all* class members who retired after March 24, 1972, with respect to benefits paid after *Manhart*. After the decision in *Manhart* became known, it was and is just as illegal under Title VII to pay disparate benefits on the basis of sex as to class members who retired prior to *Manhart* as to class members who retired after *Manhart*. Thus, although there can be no recovery with respect to illegally computed benefits paid prior to the decision in *Manhart*, all class members are entitled to recover retroactive damages for disparate benefits paid after *Manhart*.

CONCLUSION

Accordingly, for all the foregoing reasons, Plaintiffs respectfully submit that the opinion of the Eleventh Circuit Court of Appeals is in direct conflict with prior decisions of this Court and the requirements of the Equal Pay Act in affirming relief at the "unisex" rate for men and at the "female" rate for women because

this fails to correct the discrimination. And, the opinion is in conflict with one prior decision of this Court in affirming the clearly erroneous conclusion by the trial court that this employer was not guilty of "bad faith" as defined by *Albemarle*. Also, the opinion below conflicts with prior decisions of this Court by denying retroactive relief to class members who retired prior to *Manhart* in 1978. Accordingly, the *Long* decision below is in direct conflict with several important decisions of this Court. Plaintiffs request that this Court grant certiorari to review the opinion below in these respects.

Respectfully submitted,

WOODROW M. MELVIN, JR.
Counsel of Record
KEITH OLIN
CINDY NIAD-HANNAH
RUDEN, BARNETT,
McCLOSKY, SMITH,
SCHUSTER & RUSSELL, P.A.
One Biscayne Tower—Suite 2020
Miami, Florida 33131
(305) 371-6262

JEROLD FEUER
19 W. Flagler St.
Miami, Florida 33130

DAVID POPPER
7700 N. Kendall Drive
Suite 710
Miami, Florida 33156

Attorneys for Petitioners

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Supreme Court, U.S.
FILED
MAY 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-

in the Supreme Court of the United States

October Term, 1986

HUGHLAN LONG, S. DEWEY HAAS and CARL RASSLER, individually and on behalf of all retired and present male employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, as well as the surviving joint annuitants of any deceased retired male employees,

Petitioners,

vs.

THE STATE OF FLORIDA, et al.,

Respondents.

APPENDIX

WOODROW M. MELVIN, JR.
Counsel of Record
KEITH OLIN
CINDY NIAD-HANNAH
RUDEN, BARNETT, McCLOSKY,
SMITH, SCHUSTER
& RUSSELL, P.A.
One Biscayne Tower—Suite 2020
Miami, Florida 33131
(305) 371-6262

JEROLD FEUER
19 W. Flagler Street
Miami, Florida 33130

DAVID POPPER
7700 N. Kendall Drive
Suite 710
Miami, Florida 33156
Attorneys for Petitioners

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Hughlan Long and S. Dewey Haas, individually and on behalf of all retired and present employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, and all joint annuitants thereunder,

Plaintiffs-Appellees, Cross-Appellants,

v.

The STATE OF FLORIDA, a governmental body, and the Honorable Robert Graham, as Governor of the State of Florida,

Defendants-Appellants, Cross-Appellees.

Nos. 86-3282, 86-3410.

United States Court of Appeals,
Eleventh Circuit.

Dec. 19, 1986.

Opinion on Denial of Rehearing
Feb. 19, 1987.

State employees brought class action under Title VII, alleging that state officials charged with administering state retirement plan had unlawfully calculated their benefits based on sex-distinct mortality tables. The United States District Court for the Northern District of Florida, No. TCA 82-1056-09, William Stafford, Chief Judge, entered summary judgment for employees on liability issue and awarded damages. Appeal was taken. The Court of Appeals,

Godbold, Circuit Judge, held that: (1) state committed separate, actionable discriminatory acts each time it issued disparate retirement checks, so that every retiree who received such a check within 300 days of filing of any of EEOC charges could join in class litigation; (2) state was put on notice by Supreme Court decision that it could not rely on sex-distinct mortality tables to determine benefits, so that state violated Title VII by continuing to use such tables; (3) employees were entitled to retroactive relief; and (4) employees were entitled to "topping up" of benefits only to level that they would have received under sex-neutral mortality tables.

Affirmed.

1. **Judgment —828(3.42)**

State employee's Title VII claim was not barred by res judicata or collateral estoppel, though employee had earlier participated in state court action challenging state retirement system's use of sex-distinct mortality tables on equal protection grounds, as employee could not have brought Title VII action in state court. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. **Federal Civil Procedure —184.25**

To participate in class litigation under Title VII, employee must be victim of some discriminatory event that occurred no more than 300 days prior to filing of any of EEOC charges. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Federal Civil Procedure —184.25

State committed "separate, actionable discriminatory act" each time that it paid state employees retirement benefits based on sex-distinct mortality tables; accordingly, each retiree who received retirement benefits within 300 days of filing of any of EEOC charges could participate in retirees' class litigation against state under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

See publication Words and Phrases for other judicial constructions and definitions.

4. Civil Rights —32(3)

State officials had notice of employees' Title VII claims, though officials were neither named as respondents nor mentioned in employees' EEOC charges, where officials were sued in official capacities as chief executives of affected state agencies and departments administering state's retirement program. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Federal Courts —755

Trial court's finding, that state was put on notice by Supreme Court decision that it could not calculate retirement benefits for its employees based on sex-distinct mortality tables, was question of law subject to review under error of law standard.

6. Civil Rights —9.14

State was put on notice by Supreme Court decision that it could not calculate retirement benefits for its employees based on sex-distinct mortality tables, so that state violated Title VII by continuing to offer pension plans that discriminated against males; declining to follow *Probe v. State Teachers' Retirement System,* 780 F.2d 776 (9th Cir.).

7. Civil Rights —46(11)

District court order, requiring "topping up" of retirement benefits paid to retired state employees under state retirement plan, did not constitute unlawful retroactive relief, where retirement benefits were not directly based on employees' contributions to plan. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Federal Courts —858

District court's finding that state did not act in bad faith, in calculating retirement benefits payable to its employees based on sex-distinct mortality tables, was finding of fact subject to clearly erroneous standard of review in retirees' Title VII suit for prospective and retroactive relief. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Civil Rights —44(5)

District court's finding that state did not act in bad faith in calculating retirement benefits payable to its employees based on sex-distinct mortality tables was not

clearly erroneous, for purpose of deciding whether male employees adversely affected by state's action were entitled to retroactive relief, where state officials charged with administering retirement plan had relied on advice of counsel that use of sex-distinct tables was not prohibited.

10. Civil Rights —46(11)

Retired state employees were entitled to retroactive relief to compensate them for reduced retirement benefits they received based on state's improper use of sex-distinct mortality tables, to extent that state Supreme Court decision should have placed state on notice that its use of sex-distinct mortality tables was improper, where state's retirement fund had surplus of over $200 million and impact on pension funds and innocent third parties, though burdensome, would not be devastating.

11. Civil Rights —46(14)

In Title VII action, state employees that received reduced retirement benefits based on state's improper use of sex-distinct mortality tables were entitled to a "topping up" of benefits only to level that they would have received under sex-neutral tables, and not to level that female retirees received under sex-distinct tables, though female retirees had acquired vested right to benefits and would accordingly be compensated at higher level. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

12. Civil Rights —46(14)

Retroactive and prospective relief awarded to retired state employees in Title VII action, arising out of state's improper use of sex-distinct mortality tables to calculate retirement benefits, would not be prorated in accordance with employees' contributions to retirement fund, where retirement benefits were not based on individual contributions to fund.

Mang & Stowell, Douglas A. Mang, Charles T. Collette, Gary J. Anton, Augustus Aikens, Jr., General Counsel, Dept. of Admin., Tallahassee, Fla., for defendants-appellants, cross-appellees.

Jerold Feuer, Ruden, Barnett, McClosky, Schuster & Russell, Woodrow M. Melvin, Jr., Cindy Niad-Hannah, Keith Olin, David Popper, Popper and Popper, Miami, Fla., for plaintiffs-appellees, cross-appellants.

David V. Kerns, pro se.

McGuiness & Williams, Robert E. Williams, Douglas S. McDowell, Garen E. Dodge, Washington, D.C., amici curiae.

Appeals from the United States District Court for the Northern District of Florida.

Before GODBOLD and FAY, Circuit Judges, and ATKINS*, Senior District Judge.

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*Honorable C.Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

GODBOLD, Circuit Judge:

Plaintiffs brought this class action under Title VII of the Civil Rights Act of 1964 against the Florida Retirement System ("FRS") for sex discrimination in the administration of its pension plans. Plaintiff class consists of two subclasses: subclass A includes retired male employees who retired after March 24, 1972 and before August 1, 1983 and who elected to receive their pension benefits under one of the three joint-annuitant options of the FRS, and subclass B includes males presently employed by the FRS who are vested in the system because of ten years of service but who have not yet retired.

On cross-motions for summary judgment the district court found for plaintiff class because the Supreme Court's decision in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) put the FRS on notice that it could not rely on sex-distinct mortality tables to determine optional benefits, and, therefore, the FRS violated Title VII by offering pension plans that discriminated against males. The district court reserved ruling on damages until it could conduct an evidentiary hearing on the impact of such damages. After a four-day hearing, the district court concluded that all members of subclass A were entitled to prospective "topping up"[1] of their monthly

[1]By ordering the topping up of benefits, a court requires the defendant to pay the plaintiffs the difference between the benefits they actually received and the benefits they would have received had the defendant relied on the proper mortality tables.

retirement benefits to Florida's current unisex level[2] commencing on April 30, 1986,[3] which would cost the state approximately $32.3 million. The district court further found that all retirees of subclass A who retired after October 1, 1978 were entitled to retroactive topping up from that date to April 30, 1986, which would cost the state approximately $11.3 million. We affirm.

I. *Factual Background*

The FRS has operated a defined benefit pension plan[4] since 1970. The system serves over 1,100 Florida local governments as well as the state, its agencies, and the state university system. Since its inception the FRS has offered four retirement plans: its primary, single-life plan and three joint-annuitant, optional plans. Under Option 1, the primary benefit plan, a retiree receives a percentage of his average high salary for the past five years. This percentage is based on his number of years of service. If a retiree wants his pension benefits

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[2]Under unisex, or sex-neutral, mortality tables annuities are based on the average life expectancies of male and female employees. This results in higher benefits to male employees and lower benefits to female employees than provided under sex-distinct mortality tables. The FRS voluntarily switched to unisex mortality tables for all employees retiring after August 1, 1983.

[3]The district court ruled that the date of judgment, for purposes of damages, was April 30, 1986. The parties do not dispute this date as the proper date for setting damages. The actual date of the final judgment and order was May 29, 1986.

[4]In a defined benefit pension plan the employer or pension fund guarantees a certain level of benefits to retirees regardless of whether the contributions collected adequately cover the benefits.

to continue through his spouse's or another beneficiary's life, then he can choose one of the three optional, joint-annuitant plans. Option 2 is a joint and survivorship option payable for a fixed period of ten years. Option 3 is a joint-annuitant option payable for the joint lives of the retiree and his beneficiary. Option 4 is a joint-annuitant option payable to the retiree and his beneficiary for their joint lives but which, upon the death of either, reduces by one third the monthly benefits payable to the remaining life. Fla.Stat.Ann. § 121.091(6)(1982 & Supp.1986). Until August 1, 1983 the FRS based the joint annuities under these options on sex-distinct mortality tables, which resulted in lower monthly benefits to male retirees. For all employees retiring on or after August 1, 1983, the FRS now bases the joint annuities on sex-neutral mortality tables.

Since the creation of the FRS similarly situated males and females have contributed the same amounts and received the same primary benefits under Option 1. From 1970 to 1975 the FRS was funded by contributions from both employees and employers. Since 1975 the system has been funded exclusively by employer contributions, except for elected state officers. Because the employers are state and local governments and agencies, employer contributions come from public funds. All contributions to the system, except those for elected state officers, are based on a percentage of the gross compensation of participating employees. *Id.* § 121.071. Upon retirement an employee's right to a certain level of benefits under the system vests, and the system cannot reduce the retiree's benefits in the future. The FRS also must collect enough contributions to maintain the system "on a sound actuarial basis," which includes funding for current and projected operating

expenses and funding to eliminate over time the unfunded accrued actuarial liability. Fla. Const. art. X, § 14. The Florida legislature can increase or reduce the contribution rates as needed for the FRS to fulfill its obligations. *See* Fla.Stat.Ann. § 121.061.

II. *Preliminary Issues*

[1] The FRS raises several issues regarding the class, its claims, and the proper defendants. First, the FRS argues that plaintiff Long's claim against the system must be dismissed because it is barred by collateral estoppel (issue preclusion) or res judicata (claim preclusion) based on *Long v. Department of Admin.,* 428 So.2d 688 (Fla. Dist.Ct.App.1983). This argument is without merit. The *Long* court held that the FRS's use of sex-distinct mortality tables did not violate the equal protection clauses of the federal and Florida constitutions. *Id.* at 643. There is no collateral estoppel because the Florida court did not rule on Long's Title VII claim and Long did not assert a claim under Florida's employment discrimination statute, which is substantially similar to Title VII. *School Bd. of Leon County v. Hargis,* 400 S.2d. 103, 108 n. 2 (Fla.Dist.Ct. App.1981). There is no res judicata because Long could not have brought his Title VII action in state court, and the fact that he could have asserted a similar state employment discrimination claim in the original administrative hearing or its subsequent appeal does not bar a later Title VII claim. *Cf. Thomson v. Petherbridge,* 472 So.2d 773, 775 (Fla.Dist.Ct.App.1985); *Pumo v. Pumo,* 405 So.2d 224,226 (Fla.Dist.Ct. App.1981), *petition for review denied,* 412 So.2d 469 (Fla.1982).

[2, 3] Second, the FRS asserts that the certified class is improper because neither plaintiff Samaha's EEOC charge of December 27, 1979 nor plaintiff Rassler's EEOC charge of May 5, 1979 provided the system with adequate notice as required by Title VII. The FRS claims, therefore, that only plaintiff Long's EEOC charge of October 7, 1981, if not barred by collateral estoppel or res judicata, or plaintiff Rassler's amended EEOC charge of August 24, 1981, can be used to establish a cut-off date for class membership, which would include only those employees who retired within 300 days of the EEOC charge. Under Title VII the discriminatory event against each employee must take place within the requisite time frame before such an employee can be included in the class. *Payne v. Travenol Laboratories, Inc.* 673 F.2d 798, 813 (5th Cir.) *cert. denied,* 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d. 605 (1982). The discriminatory event here is not the date of retirement for each employee, as the FRS contends; rather, each month's disparate retirement check constitutes a separate actionable discriminatory event and therefore a continuing violation. *See Bazemore v. Friday,* ____ U.S. ____, 106 S.Ct. 3000, 3006, 92 L.Ed.2d. 315 (1986); *Perez v. Laredo Junior College,* 706 F.2d. 731, 733-34 (5th Cir. 1983), *cert. denied,* 464 U.S. 1042, 104 S.Ct. 708, 79 L.Ed.2d. 172 (1984). As a result every retiree who received retirement benefits within 300 days of any of the EEOC charges is properly within the class.

[4] Third, the FRS contends that the district court erred in failing to dismiss the individually named defendants, Robert Graham, Gilda Lambert, and

Andrew McMullian, III,[5] because they were neither named as respondents nor mentioned in any of the plaintiffs' EEOC charges. This argument is also without merit. These defendants were sued in their official capacities only. Although the EEOC charges failed to name these defendants specifically, they had notice of the charges through their official roles as chief executives of the affected state agencies and departments. Fla.Stat.Ann §§ 20.04(3)(a), .31(1), .31(2)(c) (Supp. 1986). The district court did not err in refusing to dismiss these defendants because they were within "the scope of the EEOC investigation which could reasonably grow out of the administrative charge[s]." *Terrel v. United States Pipe & Foundry Co.*, 644 F.2d. 1112, 1123, (5th Cir. Unit B 1981); *see also Hamm v. Members of the Bd. of Regents of the State of Florida*, 708 F.2d 647, 650 (11th Cir.1983); *Tillman v. City of Boaz*, 548 F.2d 592, 594 (5th Cir. 1977).

III. *Substantive Issues*

A. Notice

[5] The district court held that the FRS was on notice that it had to base its optional benefits on sex-neutral tables as of the Supreme Court's decision in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). In reaching this conclusion the district court expressly rejected the system's argument that the law was unsettled regarding

[5]Robert Graham is the Governor of Florida; Gilda Lambert is the secretary of the Florida Department of Administration; and Andrew McMullian, III, is the director of the Division of Retirement within the Florida Department of Administration.

pension fund responsibilities for optional pension plans until the Supreme Court's decision in *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983). We agree.[6]

[6] In *Manhart* the Supreme Court held that it was illegal for an employer to require female employees to pay higher contributions to an employee pension plan than similarly situated males in order to receive the same benefits at retirement, even if these payments were based on actuarially valid mortality tables for males and females which reflect the fact that, as a class, women live longer than men. *Manhart*, 435 U.S. at 708-09, 98 S.Ct. at 1375. The Court reasoned that Title VII focuses on fairness to the individual rather than to classes of individuals. *Id.* at 709, 98 S.Ct. at 1375. Under the plan at issue in *Manhart*, all females had to pay higher contributions to the pension plan, even though individual females might live longer that similarly situated males. Consequently, while these females were working, they "received smaller paychecks because of

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[6]Plaintiff class argues that the district court's finding that the FRS was on notice that it had to base its optional pension plans on sex-neutral mortality tables as of 1978 was a finding of fact subject to the clearly erroneous standard of review. Although the district court considered evidence regarding whether the system administrators actually knew that their optional pension plans violated Title VII, the district court's decision ultimately turned on whether the language of the *Manhart* decision put a reasonable employer on notice that it must convert to sex-neutral mortality tables. Therefore, the district court's finding that the FRS was on notice as of the Supreme Court's 1978 decision on *Manhart* is a question of law subject to review under the error of law standard.

their sex, but they will receive no compensating advantage when they retire." *Id.* at 708, 98 S.Ct. at 1375.

The Supreme Court carved out a limited exception to its ruling by holding that it would not "be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." *Id.* at 717-18, 98 S.Ct. at 1379-80.

In *Norris* The Supreme Court reexamined the *Manhart* "open market" exception. In *Norris* the state employer applied sex-neutral mortality tables to its primary, single-life retirement benefits, as required by *Manhart.* The employer also offered an optional deferred compensation plan. After inviting private insurance companies to submit bids outlining the investment opportunities that they might offer state employees, the employer selected several of these companies to participate in its optional plans. Although an employee was free to choose among the different insurance companies, they offered essentially the same retirement plans, one of which resulted in lower monthly retirement benefits to male retirees. The Supreme Court held, in a plurality opinion, that because an employer would have violated Title VII if it had offered the annuity option based on sex-distinct mortality tables itself, it violated Title VII when it offered such an option through insurance companies it had selected. *Id.* 463 U.S. at 1089, 103 S.Ct. at 3501.

Although its optional pension plans were clearly impermissible under *Norris,* the FRS argues that it

reasonably relied on the *Manhart* open market exception until the *Norris* decision and offered as options in its pension plans annuities that reflected annuities available on the open market. The system relies primarily on the Ninth Circuit's decision in *Probe v. State Teachers' Retirement System,* 780 F.2d 776, 782-83 (9th Cir.), *cert. denied,* ____ U.S. ____, 106 S. Ct. 2891, 90 L.Ed.2d 978 (1986), which reached this conclusion under similar facts. The district court found that *Probe* was wrong as a matter of law. We agree.

First, although *Manhart* only addressed contributions to a pension plan, its reasoning applies equally to benefits paid out under a pension plan. Second, and most important, the open market exception applies exclusively to third parties, and, therefore, a reasonable employer knew or should have known that its own optional annuity plans based on sex-distinct mortality tables were impermissible under Title VII. The Supreme Court created the open market exception in *Manhart* because "Title VII . . . primarily govern[s] relations between employees and their employer, not between employees and third parties." *Manhart,* 435 U.S. at 718, n. 33, 98 S.Ct. at 1380 n. 33. As Justice O'Connor later explained in *Norris,* whether the Court believed that the insurance industry should use sex-neutral mortality tables was irrelevant; the decision was up to Congress, which had chosen to limit the scope of Title VII to employers and employees. *Norris,* 463 U.S. at 1107, 103 S.Ct. at 3511 (O'Connor, J., concurring). No matter how the FRS describes its optional pension plans, the end result is that the system, *as an employer,* offered pension plans based on sex-distinct mortality tables, which was expressly prohibited by the Supreme Court in *Manhart.*

B. Prospective relief

[7] The district court properly ordered the topping up of benefits for all subclass A retirees as of the date of judgment. The FRS cannot continue to discriminate against plaintiff class. The system argues, however, that the prospective relief ordered here really constitutes retroactive relief and is therefore subject to the restrictions on retroactive awards announced by the Supreme Court in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). This argument has no merit in this case.

"When a court directs a change in benefits based on contributions made before the court's order, the court is awarding relief that is fundamentally retroactive in nature." *Norris,* 463 U.S. at 1092, 103 S.Ct. at 3501 (Marshall, J., concurring in part). This result is true because to the extent that a retirement plan represents a return on contributions made during the employee's working years that were intended to fund completely the benefits which that employee would receive in the future, any additional relief would have to come from an outside source. The Supreme Court struggled with this issue in *Norris* and ultimately concluded that topping up of retirees' benefits as of the date of judgment was impermissible where the court had already determined that retroactive relief was inappropriate. *Id.* at 1105-07, 103 S.Ct. at 3510-11 (Powell, J., dissenting in part and concurring in part); *id.* at 1111, 103 S.Ct. at 3513 (O'Connor, J., concurring).

The Second Circuit considered this problem in *Spirt v. Teacher's Ins. & Annuity Assoc.,* 735 F.2d 23 (2d Cir.),

cert. denied, 469 U.S. 881, 105 S.Ct. 247, 83 L.Ed.2d 185 (1984). The Second Circuit recognized that prospective topping up was actually retroactive relief when such an award would affect a portion of benefits attributable to contributions made prior to the date of judgment. *Id.* at 26. The court concluded, however, that such concepts of retroactivity did not apply under the facts before it because the retirement plan in question did not guarantee certain benefits upon retirement. Thus, the court reasoned, the benefits were not based on the amount of contributions made on behalf of each employee, and any topping up would not constitute retroactive relief. *Id.* at 26-27.

This same reasoning applies to the FRS plans. Almost all contributions made to the system since 1975 were made by employers using public funds. Such contributions were not made on behalf of individual employees. Rather the legislature set the employer contribution rates to cover current and future operating expenses and funding for the system's unfunded accrued actuarial liability. Consequently the benefits paid out of the fund were not directly based on the contributions paid into the fund. The district court's order to top up benefits for all subclass A retirees as of the date of judgment therefore constitutes prospective relief and is clearly permissible.

C. Retroactive relief

The district court awarded retroactive benefits to all subclass A retirees who retired after October 1, 1978.[7] The district court declined to award retroactive benefits to subclass A retirees who retired prior to October 1, 1978. We agree.

The Supreme Court has said that in a Title VII case, "given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered though past discrimination." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975). The Supreme Court refused to award retroactive damages in both *Manhart* and *Norris.* The Court relied on the equitable considerations announced by the Court in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971): (1) whether the decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) "whether retrospective operation will further or retard

[7]Although the Supreme Court decided *Manhart* on May 1, 1978 the district court ruled that the FRS was liable to plaintiff class for retroactive damages only as of October 1, 1978. The district court explained that a pension plan needed a reasonable amount of time within which to change the plan and comply with the new *Manhart* rule. Neither party challenges this date as the date by which a pension fund must comply with *Manhart.*

[the statute's] operation"; and (3) whether the decision would "produce substantial inequitable results if applied retroactively." *Id.* at 106-07, 92 S.Ct. at 355 (citations omitted); *see also Norris,* 463 U.S. at 1106-07, 103 S.Ct. 3510-11 (Powell, J., dissenting in part and concurring in part); *id.* at 1109-10 (O'Connor, J., concurring); *Manhart,* 435 U.S. at 720-21, 98 S.Ct. at 1381-82.

In *Manhart* the Supreme Court recognized that "pension administrators could reasonably have thought if unfair—or even illegal—to make male employees shoulder more than their 'actuarial share' of the pension burden." *Manhart,* 435 U.S. at 720, 98 S.Ct. at 1381. Administrators had no reason to expect that the Court would prohibit pension funds from relying on actuarially sound sex-distinct mortality tables and did not need the threat of a backpay award to cause them to amend their practices to conform to the new rule. *Id.* at 721, 98 S.Ct. at 1382. Furthermore, the award of retroactive damages would have a potentially devastating effect on the insurance and pension industry, most of whom offered annuities based on sex-distinct mortality tables. *Id.* The Court, therefore, refused to award the plaintiffs retroactive relief.

In *Norris* the Supreme Court similarly refused to award retroactive relief. Justice Powell explained that employers could reasonably have relied on the *Manhart* open market exception to offer annuities in its pension fund like those offered by insurance companies on the open market. *Norris,* 463 U.S. at 1106, 103 S.Ct. at 3510 (Powell, J., dissenting in part and concurring in part). Moreover, "holding employers liable retroactively would have devastating results." *Id.* Justice O'Connor agreed

that the decision should only be applied prospectively. She recognized that the employer's reliance on the open market exception was reasonable. She further noted that a retroactive award would not further the operation of Title VII and would likely impose inequitable results. *Id.* at 1109-10, 103 S.Ct. at 3512 (O'Connor, J., concurring).

Before applying the equitable considerations to the facts here, we must consider whether the FRS acted in bad faith. In *Albemarle,* the Supreme Court held that equity does not come into play where the employer acted in bad faith. *Albemarle,* 422 U.S. at 422-23, 95 S.Ct. at 2373-74. An employer acts in bad faith "by maintaining a practice which he knew to be illegal or of highly questionable legality." *Id.* at 422, 95 S.Ct. at 2373. Plaintiff class argues that because the district court found that *Manhart* provided adequate notice and the system had actual notice from internal memoranda and discussions, a finding of bad faith is compelled as a matter of law, and an award of back benefits is required.

[8, 9] Even though the district court's finding of lack of bad faith may constitute an ultimate fact, it is not a conclusion of law, and the district court's finding is subject to the clearly erroneous standard of review. *See Pullman-Standard v. Swint,* 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982); *Matthews v. United States,* 713 F.2d 677, 681 (11th Cir.1983). Given the district court's findings that the FRS administrators reasonably relied on the advice of David Kerns, general counsel for the Florida Department of Administration, and Nevin Smith, then secretary of the Department of

Administration, that *Manhart* did not affect their optional annuity plans, a finding of lack of bad faith is not clearly erroneous. *Cf. International Food & Beverage Systems v. Fort Lauderdale,* 794 F.2d 1520, 1526 (11th Cir.1986) ("[B]ad faith . . . is not lightly imputed to public officials: proof of bad faith must be 'irrefragible,' *i.e.* pretty strong and assimilated with a specific intent to inflict injury.")

[10] Applying the equitable consideration here, the district court properly concluded that the FRS was liable for benefits not paid to subclass A retirees as of October 1, 1978. First, the system knew or should have known since the Supreme Court's decision in *Manhart* that any benefits based on sex-distinct mortality tables was impermissible under Title VII. Second, the award of retroactive relief would not "retard the operation" or "frustrate the purpose" of Title VII. The system's argument that retroactive relief is not needed to encourage it and other employers to follow this "new" interpretation of Title VII is unpersuasive. Third, although the impact on pension funds and innocent third parties may be burdensome, it will not be devastating.

The district court found that the Florida legislature increased the system's contribution rates in 1984, creating a surplus in the fund of over $200 million. This finding of fact, based primarily on the testimony of the FRS consulting actuary, is supported by sufficient evidence and is not clearly erroneous. As a result the impact on Florida taxpayers is not great. The district court's refusal to consider evidence of the impact on pension funds on the national level was also not in error.

Manhart put all pension funds on notice that benefits could not be based on sex-distinct mortality tables; all funds, like the FRS, were forewarned and should have converted to sex-neutral mortality tables at that time. The impact on those pension funds that failed to follow the law after *Manhart* should not be considered here.

For these reasons the district court's order topping up benefits with interest from October 1, 1978 to the date of judgment for all subclass A retirees who retired after October 1, 1978 is correct. The same reasoning, however, does not apply to subclass A retirees who retired before October 1, 1978. The *Manhart* decision put all pension plans on notice that they could no longer offer pension plans based on sex-distinct mortality tables. The *Manhart* court, however, refused to apply its ruling retroactively to employees who retired prior to the date of judgment because a pension fund was not on notice then that such laws violated Title VII. It would be inconsistent now to apply this court's ruling retroactively to employees who were not affected by the *Manhart* decision itself.

D. Topping up under the unisex method

[11] The district court properly ordered the retroactive and prospective topping up of benefits under the unisex method of calculation. Under this method male benefits are raised to that level which males would have received had sex-neutral mortality tables been applied to their original benefits. Plaintiff class argues that if this method of topping up is adopted, members of subclass A will continue to receive smaller pension benefits than equally situated females who retired prior

to August 1, 1983. This is true because these female retirees have a vested right to the same level of benefits they received under the sex-distinct mortality tables, which are higher than the benefits they would have received under the unisex method. Plantiff class argues, therefore, that only by topping up benefits for male retirees and their female beneficiaries to the level of benefits for females who retired prior to August 1, 1983 can the court make the parties equal.

Plaintiff class misconstrues the purpose of Title VII. Title VII does not require equalization; it only requires that plaintiffs be made whole. "The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Albemarle,* 422 U.S. at 418-19, 95 S.Ct. at 2372 (quoting *Wicker v. Hoppsek,* 73 U.S. (6 Wall.) 94, 99, 18 L.Ed. 752 (1867)). The district court, therefore, was correct in ordering relief under the unisex method of calculation.

E. Proration

[12] The district court properly refused to prorate its awards of retroactive and prospective relief. The FRS contends that if any relief is granted it should be prorated to the percentage of the benefits not based on previous contributions by or on behalf of the individual employees. Although the district court considered testimony by the system's consulting actuary regarding the mechanics of proration, the district court refused to prorate the award. As mentioned above, benefits in the FRS are not based on individual contributions for individual employees. Instead the legislature sets a contribution rate for the employer based on the pension

plan's financial needs. The Florida legislature has the power and responsibility to increase the contribution rates periodically to cover operating costs and the unfunded accrued actuarial liability. Therefore, benefits are not based on contributions previously made into the system and proration is inappropriate.

IV. *Conclusion*

The FRS was on notice as of the Supreme Court's decision in *Manhart* that it had to base its optional pension benefits on sex-neutral mortality tables. The district court, therefore, properly ordered the topping up of all subclass A retirees' benefits to the level they would have received had the FRS relied on sex-neutral tables. The district court's further award of retroactive topping up to all subclass A retirees who retired after October 1, 1978 is also correct.

AFFIRMED.

ON PETITION FOR REHEARING

PER CURIAM:

On the issue of bad faith, the petition for rehearing correctly notes that the district court did not find that the Florida Retirement System advisors "reasonably relied" on the advice of the general counsel, and the secretary of the Florida Department of Administration. Pp. 1549-50. This does not change our conclusion that the district court did not err in finding defendants were not guilty of bad faith and does not compel this court to find bad faith as a matter of law. The district court did find that the defendants' policy was "a product of

poor judgment" but that "[n]one of the principals involved in the decision-making harbored any evil intent or design." Rather they refused to act based on a "misplaced assumption that there would be no retroactive damage award". These subsidiary findings do not require a conclusion of bad faith.

The petition for rehearing is DENIED.

UNITED STATES COURT OF APPEALS
Eleventh Circuit
50 Spring Street, S.W.
Atlanta, Georgia 30303-3147

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names Of Parties

February 19, 1987

Messrs. Douglas A. Mang
Charles T. Collette
P.O. Box 1019
Tallahassee, FL 32302

No. 86-3282 Long, et al. v. The State of Florida, et al. and 85-3410.

MANDATE STAYED TO AND INCLUDING March 23, 1987.

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Rule 19.1 of the Supreme Court, effective June 30, 1980, states that a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of

the case by that Court. However, this Court will not transmit the record to the Supreme Court until that court requests to review it.

A copy of the opinion, judgment, or Rule 25 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

MIGUEL J. CORTEZ, CLERK
By /s/ Linda Pritt
Deputy Clerk

cc: Mr. David Popper
Messrs. Woodrow M. Melvin, Jr.
Keith Olin
and Ms. Cindy Niad-Hannah
Mr. David V. Kerns
Messrs. Robert E. Williams
Douglas S. McDowell
Garen E. Dodge

MDT-2
(Rev. 10/84)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-3282 & 86-3410

HUGHLAN LONG and S. DEWEY HAAS, etc, et al.,

Plaintiffs-Appellees, Cross-Appellants,

versus

THE STATE OF FLORIDA, a governmental body, and the Honorable ROBERT GRAHAM, as Governor of the State of Florida,

Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court for the Northern District of Florida

(Filed February 19, 1978)

ORDER:

( ) The motion of *Defendants-Appellants, Cross-Appellees* for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(√) The motion of *Defendants-Appellants, Cross-Appellees* for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including 30 days from this order the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of ..... for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of ..... for a further stay of the issuance of the mandate is DENIED.

/s/ John C. Godbold
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-3282 and 86-3410

HUGHLAN LONG and S. DEWEY HAAS, individually and on behalf of all retired and present employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, and all joint annuitants thereunder,

Plaintiffs-Appellees-
Cross appellants,

versus

THE STATE OF FLORIDA, a government body, and The Honorable ROBERT GRAHAM, as Governor of the State of Florida,

Defendants-appellants-
Cross appellees.

Appeal from the United States District Court for the Northern District of Florida

(Filed March 10, 1987)

ORDER:

( ) The motion of ..... for [ ] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of ..... for [ ] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including ....., the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the

mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

(X) The motion of appellant-cross appellees for a further stay of the issuance of the mandate is GRANTED to and including April 22, 1987, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of appellants-cross appellees for a further stay of the issuance of the mandate is DENIED.

/s/ John C. Godbold
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3282 & 86-3410

HUGHLAN LONG and S. DEWEY HAAS, individually and on behalf of all retired and present employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, and all joint annuitants thereunder,

Plaintiffs-Appellees,
Cross-Appellants,

versus

THE STATE OF FLORIDA, a governmental body, and the Honorable ROBERT GRAHAM, as Governor of the State of Florida,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the Northern District of Florida

(Filed July 7, 1986)

Before GODBOLD, Chief Judge and RONEY and FAY, Circuit Judges.

BY THE COURT:

— Appellant's motion for stay of the order of June 13, 1986 pending appeal is GRANTED.

The Court further, on its own motion, GRANTS the consolidation of 86-3282 and 86-3410 and expedites the appeals.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

HUGHLAN LONG, et al.

Plaintiffs,

v.

STATE OF FLORIDA, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: TCA 82-1056-WS

(Filed May 29, 1986)

[ ] *Jury Verdict.* This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] *Decision by Court.* This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that final judgment be and is hereby entered in favor of the plaintiffs and against the defendants as follows:

1. The court's prior orders of March 16, 1984, and March 31, 1986, are confirmed and incorporated herein as if fully set forth.

2. As to the approximately $32,327,000 of prospective relief (see paragraph 1, page 40, of the order filed March 31, 1986) defendants are mandatorily enjoined and directed to determine the specific monthly amount of the award owed to each class member per month. Defendants shall commence monthly payment of such award in each member's monthly pension check. Payments shall commence July 1, 1986, except as to 500 plaintiffs whose files require manual processing. Payments to those plaintiffs shall be-

gin October 1, 1986, as provided in the stipulation and joint proposal filed by the parties on May 6, 1986.

3. As to the approximately $11,249,451 award which is presently due and owing, (see paragraph 2, page 40, of the order filed March 31, 1986) defendants are mandatorily enjoined and directed to determine the specific total amount of the award owed to each class member and to pay such amount in full to each class member by September 1, 1986. Those plaintiffs whose files require manual processing shall receive payment on March 1, 1987.

4. As to the relief for each class member as set forth in paragraph 2 hereof, defendants are directed to pay in full on September 1, 1986, such relief as shall accrue between May 30, 1986 (final judgment date) and July 1, 1986, effective date for commencement of payment as set forth in paragraph 2.

5. The court shall, be separate order, determine the specific amount, time and manner of the payment of attorneys' fees to plaintiffs' legal counsel after notice and hearing. No disbursement of attorneys' fees shall occur without further order of the court.

6. Costs shall be taxed pursuant to further order of the court.

7. The court hereby retains jurisdiction to enter such further orders as necessary or to enforce this judgment.

Dated: May 29, 1986 MARVIN S. WAITS, Clerk

By /s/ Ma'Sue Sweeney
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

HUGHLAN LONG, et al.,

Plaintiffs, TCA 82-1056-WS

v.

ORDER

STATE OF FLORIDA, et al., (Filed May 28, 1986)

Defendants.

This cause came on for final hearing on February 3, 4, and 5 and 10, 1986. On March 31, 1986, the court entered a non-final order awarding relief to plaintiffs' class, and directed the parties to file a joint proposal for implementation of that relief. Upon consideration of the stipulation and joint proposal, final judgment shall be and is hereby entered in favor of the plaintiffs and against the defendants as follows:

1. The court's prior orders of March 16, 1984, (document 2713) and March 31, 1986, (document 2896) are confirmed and incorporated herein as if fully set forth.

2. As to the approximately $32,327,000 of prospective relief[1] (see paragraph 1, page 40, of the order filed March 31, 1986) defendants are mandatorily enjoined and directed to determine the specific monthly amount of the award owed to each class member per month. Defendants

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[1] In *Arizona Governing Committee, etc. v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492, 3503 (1983), the Supreme Court noted that "when a court directs a change in benefits based on contributions made before the court's Order, the court is awarding relief that is fundamentally retroactive in nature." Of course, since the FRS is a non-contributory plan, the change in benefits required by this order is *not* based on prior contributions and so the relief is not fundamentally retroactive in nature.

shall commence monthly payment of such award in each member's monthly pension check. Payments shall commence July 1, 1986, except as to 500 plaintiffs whose files require manual processing. Payments to those plaintiffs shall begin October 1, 1986, as provided in the stipulation and joint proposal filed by the parties on May 2, 1986.

3. As to the approximately $11,249,451 award which is presently due and owing, (see paragraph 2, page 40, of the order filed March 31, 1986) defendants are mandatorily enjoined and directed to determine the specific total amount of the award owed to each class member and to pay such amount in full to each class member by September 1, 1986. Those plaintiffs whose files require manual processing shall receive payment on March 1, 1987.

4. As to the relief for each class member as set forth in paragraph 2 hereof, defendants are directed to pay in full on September 1, 1986, such relief as shall accrue between the May 30, 1986 (final judgment date) and the July 1, 1986, effective date for commencement of payment as set forth in paragraph 2.

5. The court shall, by separate order, determine the specific amount, time and manner of the payment of attorneys' fees to plaintiffs' legal counsel after notice and hearing. No disbursement of attorneys' fees shall occur without further order of the court.

6. Costs shall be taxed pursuant to further order of the court.

7. The court hereby retains jurisdiction to enter such further orders as necessary or to enforce this judgment.

DONE and ORDERED this 28th day of May, 1986.

/s/ William Stafford
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

HUGHLAN LONG, et al.,

Plaintiffs,

v.

STATE OF FLORIDA, et al.,

Defendants.

TCA 82-1056-WS

ORDER

(Filed March 31, 1986)

This cause came on for final hearing on February 3, 4, 5, and 10, 1986. Now having heard the evidence and the argument of counsel and being otherwise fully advised of the premises, the court makes the following findings of fact and conclusions of law. Fed. R. Civ. P. 52.

BACKGROUND

This case is a class action brought by certain members of the Florida Retirement System under Title VII of the Civil Rights Act of 1964. Specifically, plaintiffs claimed that the use of sex-distinct mortality tables in calculating retirement benefits was unlawfully discriminatory. On March 16, 1984, this court granted plaintiffs' motion for summary judgment as to liability, reserving the question of the propriety of a damage award. The court found that the denial of retroactive damages in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983) did not preclude such an award in the case at bar, but that before any retroactive damages could be awarded, the court had to consider the three factors set forth in *City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978). The court found that *Norris* did not establish a new principle of law and that retroactive damages would not retard

the operation of Title VII. This February hearing was held to adduce evidence as to the third factor—the impact on the fund.

FINDINGS OF FACT

The parties stipulated to the following facts, and such facts are hereby adopted by the court:

1. As presently certified, plaintiffs' class consists of two distinct and separate subclasses. Subclass A, as presently defined, consists of all male members of the Florida Retirement System (FRS) who retired before August 1, 1983, and the joint annuitants or beneficiaries of those deceased male members who are presently receiving benefits under options 2, 3, or 4 of the FRS. Subclass A is certified under Federal Rules of Civil Procedure 23(b)(1), (2) & (3). Subclass B consists of currently vested male members of the FRS or males who retired on or after August 1, 1983, under options 2, 3, or 4 of the FRS, and their joint annuitants or beneficiaries, and is certified under Federal Rule of Civil Procedure 23(b)(2).

2. The defendants are the State of Florida, the Honorable Robert Graham as Governor of the State of Florida, Andrew J. McMullian, III, Director of the Division of Retirement of the State of Florida Department of Administration, and Gilda Lambert, present Secretary of the Florida Department of Administration who, by operation of Federal Rule of Civil Procedure 25(d), has been substituted in place and instead of Nevin Smith, the previous Secretary of the Florida Department of Administration and an initially named defendant.

3. Plaintiffs' subclass A, excluding those persons who retired between June 1, 1983, and July 31, 1983, has

been properly noticed pursuant to Federal Rule of Civil Procedure 23(c)(2), and includes all persons noticed who have not opted out.

4. The State of Florida, for the purposes of Title VII, is the "employer" of the members of the plaintiffs' class and is authorized and charged under the Florida Statutes with the duty and responsibility of lawfully administering the FRS. No third party unrelated to the State of Florida is authorized to or does administer the FRS fund.

5. The FRS is a defined benefit plan rather than a defined contribution plan. Under the FRS plan, the vested benefits owed are calculated by computing an average final compensation based upon the average annual compensation for the five highest-paying years of compensation preceding retirement.

6. The State of Florida's use of sex-distinct actuarial tables has resulted in lower monthly benefits to male class members in subclass A than to their similarly situated female counterparts.

7. The State of Florida is contractually precluded from lowering the amount of retirement benefits to an employee once the employee has retired and has received his or her retirement option benefit.

8. For 1983, the actuarial value of the FRS plan assets was 6.511 billion dollars.

9. As of June 30, 1985, assets in the FRS trust fund were 8.213 billion dollars.

10. Dr. E.J. Yelton, Executive Director of the State Board of Administration, testified in deposition in this case

on September 19, 1985, that the FRS fund existing to pay benefits then had a present vale of 9 billion dollars.

11. From 1980 forward, the Division of Retirement has calculated the actuarial present value of benefits for all retirees receiving a benefit payment during July of each year. The actuarial present value of benefits for those members entitled to a deferred benefit are summarized as follows:

YEAR	Actuarial Present Value*
1980	$2,340,300,000.00
1981	$2,824,974,000.00
1982	$3,242,009,000.00
1983	$3,802,323,000.00
1984	$4,142,611,000.00

12. For 1980 and 1983, the actuarial present value of vested accrued benefits as of the date of the FRS plan valuation are as follows:

Year of Valuation	Actuarial Present Value
1980	
Vested Accrued Benefits	$5,134,048,000.00
1983	
Vested Accrued Benefits	$6,382,782,000.00

For 1980 and 1983, the actuarial present value of nonvested accrued benefits as of the date of the FRS plan valuation are as follows:

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* For the years 1980, 1981, and 1982 the rate of interest assumed was 8½%. For the years 1983 and 1984, the rate of interest assumed was 9%. For all years, the 1971 Group Annuity Mortality Table was assumed; however, for 1983 and 1984, the mortality tables were set back three years.

Year of Valuation	Actuarial Present Value
1980	
Non-vested Accured Benefits	undetermined
1983	
Non-vested Accrued Benefits	$1,195,127,000.00

13. The actuarial present value of future payroll of the current FRS membership as of the valuation date indicated below is:

Year of Valuation	Actuarial Present Value
1977	$19,555,000,000.00
1980	$34,215,000,000.00
1983	$65,828,000,000.00

14. For the fiscal year ending on June 30, 1981, the FRS reported an addition to reserves (revenues less expenses and disbursements) of over $539,086,368.00.

15. For the fiscal year 1982-1983, FRS revenues less expenditures were in excess of $1,051,122,403.00.

16. For the fiscal year ending June 30, 1984, the FRS experienced a $950,738,065.00 addition to reserves (total revenues less total expenses and disbursements).

17. For the fiscal year ending on June 30, 1985, FRS expects a $1,166,639,933.00 addition to reserves (total revenues less total expenditures and disbursements).

18. For the fiscal year 1985-1986, total benefit payouts for FRS obligations are expected to be less than $700,000,000.00.

19. In the opinion of the FRS consulting actuary the FRS would have been in actuarial balance had the Florida

legislature adopted contribution rates no greater than those suggested by Tillinghast, Nelson & Warren, Inc. on the basis of the July 1, 1983, actuarial review.

20. The Florida legislature adopted contribution rates 24 base (basis) points higher than those suggested by Tillinghast, Nelson & Warren, Inc. on the basis of the July 1, 1983, actuarial review and as published in the Florida Retirement Systems Bulletin, dated September, 1984. An additional base (basis) point was adopted and assigned to retiree costs of living increases.

21. A 0.25% increase in the FRS contribution rate is the equivalent of 25 base (basis points).

22. Article X, Section 14 of Florida's Constitution requires that the FRS shall not provide any increase in the benefits to the members or beneficiaries of the FRS unless the FRS has made or currently makes provision for the funding of the increase in benefits on a sound actuarial basis.

23. As of April 25, 1978 (the date of the *Manhart* decision) the Department of Administration had the authority to adopt unisex tables and implement their use for all future retirees, if the tables adopted would not have an actuarial impact which would require an increase in the contribution rates.

24. As of April 25, 1978, the Department of Administration had not developed a no-cost method of implementing unisex tables but one was adopted as of August 1, 1983.

25. On August 1, 1983, the State of Florida, Department of Administration, Division of Retirement, adopted unisex tables applicable to those persons retiring on or

after August 1, 1983, without any proration made after April 25, 1978.

26. Over 95% of the joint annuitants in plaintiffs' class for those class members who chose options (3) and (4) are, under Florida law, "spouses" of FRS members who are or were members of plaintiffs' class.

27. Since 1975, contributions to the FRS have been made almost exclusively from public funds. Prior to 1975, contributions to the FRS were made both from public funds and from employee contributions. At all times the contribution rate for similarly situated males and females was equal.

28. The employers participating in the FRS are the state government and political subdivisions of the State of Florida, although not all political subdivisions of the State of Florida participate in the FRS.

29. There are over 1,100 local political subdivisions of the State of Florida participating in the FRS.

30. The Division of Retirement has calculated the rate of return on the FRS Trust Fund investments for the following fiscal years, ending June 30 of each year as follows:

Fiscal Year	Net Yield Rate
1974 - 1975	7.25%
1975 - 1976	8.02%
1976 - 1977	8.19%
1977 - 1978	8.26%
1978 - 1979	8.61%
1979 - 1980	9.09%
1980 - 1981	9.60%
1981 - 1982	10.19%
1982 - 1983	9.68%
1983 - 1984	9.27%
1984 - 1985	9.00%

In calculating the above, the Division of Retirement excluded capital gains and losses; the valuation basis for bonds is the amortized value thereof; the valuation basis for equities is the cost thereof.

The valuation method used by the Division of Retirement is different from the method used by the State Board of Administration.

31. The FRS was created on December 1, 1970, out of the Teacher's Retirement System, the State & County Officer & Employees' Retirement System (SCOERS), and the Highway Patrol Pension Fund. In 1972 the Elected State Officers' Class was created as part of the FRS and the Judicial Retirement System was consolidated into the FRS.

32. In 1975, the FRS became employee-noncontributory for regular and special risk members. Thereafter, from 1975 to present, all contributions to the FRS for regular and special risk members have been made solely by such employees' employers.

33. From its inception in 1970 to present, the FRS has been funded by equal contributions as to similarly situated males and females, i.e., the contributions to the FRS made by or on behalf of males and females earning the same salary were and are identical.

34. The FRS retirement plan has and had four methods or options of benefit payments.

35. From its inception to present, the first and primary single-life method of benefit payment (Option 1) paid and pays similarly situated males and females the same monthly benefit, i.e., males and females of the same age retiring with the same length of service and the same

average final compensation receive and received the same monthly benefit under Option 1.

36. Option 2 is and was a joint and survivorship option payable for the fixed period of ten (10) years. Prior to August 1, 1983, it was calculated using sex-distinct mortality tables which resulted in a lower monthly retirement benefit paid to males than to similarly situated females.

37. Option 3 is and was a joint-annuitant option payable for the joint lives of the retiree and his or her designated beneficiary. Prior to August 1, 1983, it was calculated using sex-distinct mortality tables which resulted in a lower monthly benefit paid to males than to similarly situated females.

38. Option 4 is and was a joint-annuitant option payable to the retiree and his or her designated beneficiary for their joint lives but which, upon the death of either, thereafter reduces by one-third (1/3) the amount of the monthly benefit payable for the remaining life. Prior to August 1, 1983, it was calculated using sex-distinct mortality tables which resulted in a lower monthly benefit paid to males than to similarly situated females.

39. Under the FRS, retirement benefits are payable only to retirees of governmental employers participating in the FRS who have reached a designated age and who have worked for at least ten (10) years for an employer participating in the FRS; that is, ten (10) years of service with an FRS participating employer are required before an employee's right vests to receive retirement benefits from the FRS. With respect to the Elected State Officers Class (ESOC) only, vesting occurs in eight (8) years.

40. Historically and presently the FRS is advised prior to retirement that an employee who has vested rights to receive retirement benefits from the FRS plans to retire. The FRS calculates the retirement benefits which that employee would receive under each of the FRS's four options of benefit payment and supplies such information to the employee. The employee then elects the retirement option under which he or she wishes to receive retirement benefits, and the FRS then calculates that employee's retirement benefit under the option selected as of the employee's effective date of retirement. This final calculation of the retired employee's monthly retirement under his or her selected option is likewise supplied to the retired employee. Thereafter, the employee receives monthly retirement benefits under the option selected as calculated by the FRS with respect to the employee's effective date of retirement.

41. The monthly benefit, described in paragraph 40 above, may thereafter be and is increased by such things as costs of living adjustments or Acts of the Florida Legislature, but may not be and is never subsequently reduced.

42. Employer contributions to the FRS and the contribution rates for the designated classes within the FRS are summarized as follows:

Fiscal Year	Employer Contributions	Regular	Special Risk	Selected State Officers
7/75-6/76	$312,000,000	9%	13%	8%
7/76-6/77	$367,000,000	9%	13%	8%
7/77-6/78	$377,000,000	9%	13%	12%
7/78-6/79	$407,000,000	9.0/9.1%	13.00/13.95%	12.00/16.78%
7/79-6/80	$449,000,000	9.1%	13.95%	16.78/20.78%
7/80-6/81	$505,000,000	9.1%	13.95%	20.78%
7/81-6/82	$639,000,000	9.10/10.93%	13.95/13.91%	20.78%
7/82-6/83	$718,000,000	10.93%	13.91%	20.78%
7/83-6/84	$790,000,000	10.93%	13.91%	20.78%
7/84-6/85	$893,000,000	10.93/12.24%	13.91/14.67%	20.78%

NOTE: Where two rates are indicated, i.e., 10.93/12.24, the first rate, 10.93, applies to the first three months of the fiscal year and the second rate, 12.24, applies to the remaining nine months of the fiscal year.

43. Damage estimates for class members retiring after March 24, 1972, are as follows:

A. Double Sex Change

Applying the tables in use by the FRS prior to August 1, 1983, and changing the gender in those tables of both the member and his joint annuitant, the liability to the FRS Trust Fund is estimated as follows:

AS OF JULY 1, 1985:

Payments with interest from May, 1, 1978	$ 68,300,000.00
Present value of future payments to class members	113,199,000.00
TOTAL:	$181,499,000.00

AS OF JULY 1, 1986:

Payments with interest from May 1, 1978	$ 86,669,000.00
Present value of future payments to class members	113,894,000.00
TOTAL	$200,563,000.00

B. *Single Sex Change*

Applying the tables in use prior to August 1, 1983, and assuming a change in the gender from those tables for the

class member only, the liabilities to the FRS Trust Fund are estimated as follows:

AS OF JULY 1, 1985:	
Payments with interest from May 1, 1978	$ 47,640,000.00
Present value of future payments to class members	78,132,000.00
TOTAL	$125,772,000.00
AS OF JULY 1, 1986:	
Payments with interest from May 1, 1978	$ 60,518,000.00
Present value of future payments to class members	78,751,000.00
TOTAL	$139,269,000.00

C. *Unisex Method*

Applying the unisex tables adopted on August 1, 1983, to this class, the liabilities to the FRS Trust Fund are estimated as follows:

AS OF JULY 1, 1985:	
Payments with interest from May 1, 1978	$ 19,846,000.00
Present value of future payments to class members	32,108,000.00
TOTAL	$ 51,954,000.00
AS OF JULY 1, 1986:	
Payments with interest from May 1, 1978	$ 25,182,000.00
Present value of future payments to class members	32,265,000.00
TOTAL	$ 57,447,000.00

44. Damage estimates for class members retiring after April 25, 1978 (May 1, 1978 payroll entries) are as follows:

A. *Double Sex Change*

Applying the tables in use prior to August 1, 1983, by the FRS and changing both the gender of the member and his joint annuitant, the liabilities accruing to the FRS Trust Fund are estimated as follows:

AS OF JULY 1, 1985:

Payments with interest from May 1, 1978	$ 33,624,000.00
Present value of future payments to class members	79,159,000.00
TOTAL	$112,783,000.00

AS OF JULY 1, 1986:

Payments with interest from May 1, 1978	$ 44,375,000.00
Present value of future payments to class members	79,821,000.00
TOTAL	$124,196,000.00

B. *Single Sex Change*

Applying the pre-August, 1983 annuity tables to members of this class and assuming the member to be female rather than male, without changing the gender of the member's joint annuitant, the total additional liabilities accruing to the FRS Trust Fund are estimated as follows:

AS OF JULY 1, 1985:

Payments with interest from May 1, 1978	$ 23,660,000.00
Present value of future payments to class members	55,132,000.00
TOTAL	$ 78,792,000.00

AS OF JULY 1, 1986:

Payments with interest from May 1, 1978	$ 31,238,000.00
Present value of future payments to class members	55,540,000.00
TOTAL	$ 86,770,000.00

C. *Unisex Method*

Applying the unisex tables adopted on August 1, 1983, to this class, the liabilities to the FRS Trust Fund are estimated as follows:

AS OF JULY 1, 1985:

Payments with interest from May 1, 1978	$ 9,698,000.00
Present value of future payments to class members	22,354,000.00
TOTAL	$ 32,052,000.00

AS OF JULY 1, 1986:

Payments with interest from May 1, 1978	$ 12,800,000.00
Present value of future payments to class members	22,510,000.00
TOTAL	$ 35,310,000.00

45. Proration is a commonly used and accepted technique used by actuaries as well as others. Defendants suggest that several methods of proration could be applied in this case to allocate a total impact value before and after any date certain. The proration techniques give rise to mathematical formulas which are commonly used or commonly accepted and yield results consistent with the method employed. The following results are arithmetically consistent with the methods of proration used.

A. For what the defendants have labeled "accrued benefit proration" the following allocation formula is applicable:

Pre-5/78 Portion:

$$\frac{\text{Accrued Benefit at Retirement}}{\text{Accrued Benefit at Retirement}}$$

Post-5/78 Portion:

$$\frac{\text{(Accrued Benefit at Retirement} - \text{Accrued Benefit at 5/78}}{\text{Accrued Benefit at Retirement}}$$

B. For what the defendants have labeled "contribution proration," the following allocation formula is applicable:

Pre-5/78 Portion:

$$1 - \text{Post 5/78 Portion}$$

Post-5/78 Portion:

$$\frac{\text{Contributions Made from 5/78 to Date of Retirement Accumulated at Valuation Rate of Interest}}{\text{Account Balance or Reserve at Retirement}}$$

C. The above allocation formulas were applied individually to each participant.

The following proration values were obtained using the above formulas:

1. *ACCRUED BENEFIT PRORATION*

For May, 1978, Entry Date and July 1, 1985, Damages Date. No calculations were performed for the 1972 Entry Date Class.

a. Unisex	(Unprorated)	Prorated
ments with Interest from May 1, 1978	$ 9,777,247.00	$ 2,034,099.00
ent Value of Future Payments	22,402,994.00	5,901,497.00
TOTAL	$32,180,241.00	$ 7,935,596.00
b. Single Sex Change		
ments with Interest from May 1, 1978	$23,856,628.00	$ 4,940,564.00
ent Value of Future Payments	55,247,864.00	14,522,627.00
TOTAL	$79,104,492.00	$19,463,191.00
c. Double Sex Change		
ments with Interest from May 1, 1978	$33,908,236.00	$ 6,950,515.00
ent Value of Future Payments	79,237,338.00	20,667,571.00
TOTAL	$113,145,574.00	$27,618,086.00

2. *CONTRIBUTION PRORATION*

For May, 1978, Entry Date and July 1, 1985, Damages Date

a. Unisex	(Unprorated)	Prorated
ments with Interest from May 1, 1978	$ 9,777,247.00	$ 570,351.00
ent Value of Future Payments	22,402,994.00	1,716,767.00
TOTAL	$32,180,241.00	$ 2,287,118.00
b. Single Sex Change		
ments with Interest from May 1, 1978	$23,856,628.00	$ 1,387,979.00
ent Value of Future Payments	55,247,864.00	4,217,828.00
TOTAL	$79,104,492.00	$ 5,605,807.00
c. Double Sex Change		
ments with Interest from May 1, 1978	$33,908,236.00	$ 1,929,160.00
ent Value of Future Payments	79,237,338.00	5,958,429.00
TOTAL	$113,145,574.00	$ 7,887,589.00

With respect to proration of accrued benefits the following information was obtained via computer tape from the Division of Retirement:

- Average final compensation at retirement
- Service credit at retirement
- Average final compensation at 5/78
- Salary earned by month from 5/78 to date of retirement

The following calculations were performed by Tillinghast:

- Accrued benefit at retirement was determined by multiplying average final compensation at retirement by service percentage at retirement.
- Service percentage from 5/78 to date of retirement was determined by converting the earning for each month into applicable service credit (if sufficient earnings were accrued a month of service credit at the applicable percentage was recognized).
- Service percentage at 5/78 was determined by subtracting from service percentage earned from 5/78 to retirement.
- Accrued benefit at 5/78 was determined by multiplying average final compensation at 5/78 by service percentage at 5/78.

With regard to proration contributions, the following items were input taken from the Division of Retirement data tapes:

— Account balance or reserve at date of retirement

— Earnings by month for the period 5/78 to date of retirement

The following calculations were performed by Tillinghast:

— Contributions made from 5/78 to date of retirement were determined by multiplying the applicable system rate by the earnings for each month and accumulated at the applicable valuation interest rate for that period. (7% from 78-80, 8½% from 80-83)

From these above described calculations, the proration allocation formulas, as previously described, were then performed, and the results of these individual calculations are summarized in the six output listings previously labeled.

44. The actuarial equivalency tables adopted by the FRS effective August 1, 1983, do produce an equal monthly benefit for identically situated males and females retiring on or after August 1, 1983.

As to the disputed facts and facts further adduced at trial, the court makes the following findings:

1. Nevin G. Smith was Assistant Secretary and then Secretary of the Department of Administration. Although Mr. Smith was aware of the *Manhart* decision, he did not believe that *Manhart* compelled a change in the FRS. His belief was based on the oral advice he received from the department's general counsel, David Kerns. Smith felt the sex-neutral primary benefit (Option 1) took the FRS out of the ambit of *Manhart's* holding.

DOA could only make changes in FRS if the changes did not cost the state money. The secretary did not want to take the only available no-cost approach, that is, reducing the benefit payable to women.

The secretary was unaware of the concerns of Lawrence Gibney in 1978 but knew that the division was concerned about *Manhart* in 1979. The secretary admitted that he knew about the complaint of Carl Rassler because he responded to a letter from Representative John Grant to McMullian.

2. David Kerns was general counsel for the Department of Administration. It was his opinion that *Manhart* was not directly applicable to the FRS. Kerns distinguished *Manhart* on three grounds: *Manhart* involved the pay-in stage; it involved a mandatory primary benefit; and it discriminated against women. Defendant's Exhibit 15.

Mr. Kerns recognized that he faced a conflict of interest in that he was not far from retirement. He requested one of his junior attorneys, Samantha Boge, to prepare a memo on the issue. In this September 1, 1981, memo, Ms. Boge concludes that "the Division would be well advised to convert from sex-distinct actuarial tables to unisex tables as soon as is practical." Defendant's Exhibit 14. Mr. Kerns disagreed with Ms. Boge's conclusion and continued to counsel a wait-and-see approach to the issue. He wanted to wait for further word from the Supreme Court itself but did not imagine that five more years would elapse before the next decision.

3. Andrew J. McMullian is the State Retirement Director of the Division of Retirement. Mr. McMullian was aware of the debate over *Manhart* but was convinced that

Manhart did not compel a change and thus felt no change was necessary. McMullian maintained his position of wait-and-see even though he received a memorandum from one of his staff attorneys, Diane Kiesling, who suggested that the FRS adopt unisex tables "as soon as practicable" because of the danger of retroactive awards." Plaintiff's Exhibit 7.

McMullian himself had no power to change the FRS, but he could make recommendations to the Secretary of the DOA. At the September 4, 1981, meeting attended by Smith, Kerns, Augustus Aikens (Division Attorney), Gibney, Grenard and McMullian, a consensus was reached to continue to use the sex-distinct tables for Options 2, 3, and 4.

4. The FRS is composed of three different classes of retirees with 99% being the regular class, plaintiffs in this case. The plan offers four options. Option #1, the primary benefit, is a monthly payment until death and is based and has always been based on unisex tables. Options 2, 3, and 4 were based on sex-distinct, though actuarially sound, tables.

There are over 1100 employer participants in the FRS. Those employers who have the option of joining FRS cannot opt out once they elect to join. There are 105 city employers, 67 counties, 300 special districts, with local school boards making up 45% of the membership. The FRS is funded by contributions from the employers based on the payroll, hence the term "non-contributory." The rate of contribution is set by the Legislature, on recommendation from the DOA. The rate is some percentage of the payroll, computed in "base points" or "basis points." One percent

equals 100 base points. According to McMullian, any change in the contribution rate less than one base point (.01%) is insignificant and may be accomplished without legislative action.

5. Michael J. Tierney is an actuary in the firm of Tillinghast, Nelson & Warren, Inc., which is the actuarial firm responsible by contract to the FRS. One of Mr. Tierney's duties is to give his opinion of FRS's condition. The following facts are adduced from Tierney's testimony as an expert witness and are hereby made the findings of this court:

(a) The FRS fund has several components of which one of the most important is the unfunded accrued actuarial liability (UAAL). The UAAL is the accumulation of all past normal costs minus the funds assets. The UAAL is amortized over 30 years. The contribution rate is determined by adding normal costs and the amortization of the UAAL. The rate is now 12.24. The FRS need not have money on hand for future normal cost because the goal is to have future taxpayers pay for future costs.

(b) "Actuarial balance" means that expected future (projected) benefits are covered by expected future assets.

(c) The value of one basis point is approximately 9 million dollars.

(d) A change in mortality assumptions is much less significant than a change in interest rate assumptions. However, any change in assumptions must be made across-the-board to preserve the integrity of the system.

(e) Although the legislature has increased the contribution rate, the rate has never been decreased.

(f) The 1985 Legislature increased the contribution rate 25 basis points.

6. Dr. James McClave offered expert testimony as to the effect of a damage award on the employer-participants of the FRS. In his opinion, any damage award will cause an adverse impact on the county and school board employer-participants since those entities are already experiencing, or will soon experience, an outstripping of taxable property by expenditures.

7. Dr. E.J. Yelton is the Executive Director of the State Board of Administration who is charged with investing the FRS fund. The SBA values the fund assets at market value while the Division and the actuaries use a method similar to book value. The two methods result in widely varying valuations of the fund's condition. The SBA, however, is not at all charged with keeping the fund actuarially sound. Yelton estimated a monthly cash flow of 83-85 million dollars.

8. Lawrence Gibney is the state retirement actuary. In November 1976, Gibney sent a memorandum to the state retirement director to apprise him of certain trends in the industry. Plaintiffs' Exhibit 20. Gibney noted that because of the "general thrust" taken by the EEOC, there was a "strong possibility" that sex-distinct tables would be impermissible. Gibney likened the trend to that of the 1960's when race-based tables were outlawed, even though such tables made sense actuarially. Gibney prepared this memo as part of his routine duties to reevaluate the mortality tables as they relate to retired lives. The director did not respond.

In May 1978, Gibney again addressed the issue of unisex tables and warned his superior that, in light of *Man-*

hart, "it is not a question of 'if' but 'when' " the tables would be adopted. Plaintiffs' Exhibit 21. Again, his superior did not respond.

In August 1978, Gibney wrote Kerns, on orders from the retirement director to keep the general counsel informed. Plaintiffs' Exhibit 22. This memorandum is more equivocal than its predecessors, and Gibney concluded the use of sex-based actuarial tables was appropriate until the issue of using the tables to determine actuarial equivalence was addressed.

In November 1978, four months later, in a memo to the file on *Manhart* and the "court case of Oregon," Gibney stated his opinion that "eventually we will be forced to adopt the so-called 'unisex' table so that both male and female members receive the same benefits regardless of their sex." Plaintiffs' Exhibit 23. Gibney also noted that a unisex table would have no effect on the system itself, although the members would be affected. Gibney recommended the use of the unisex table and suggested that the Legislature should implement the change.

In May 1979, Gibney conducted the survey of other state systems (See, Plaintiffs' Exhibit 24) and reported the results to McMullian in June 1979. Plaintiffs' Exhibit 4. In May 1981, Gibney wrote to McMullian about Hughlan Long's specific complaint. Plaintiffs' Exhibit 25. The text of the memo is as follows:

> During our recent discussion of Mr. Long's letter especially with regard to the option factors, it appears to me we should make plans for implementing a "unisex" table by January 1983. We'll need to delay because of outstanding estimates. If we should decide to "bite the bullet" we could inaugurate a "unisex" table beginning September 1981 for estimates.

My reason for suggesting early implementation on our own is to avoid any possible retroactive liability that may arise. As I have mentioned in the past, the "unisex" factors are interpolated values between the present factors, the bases of which is our actual experience. As a result, the male benefit would increase and the female benefit would decrease. If we were forced by a court order to a "unisex" table, it's conceivable we would have to make adjustments back to the date of the Manhart Case which occurred in September (sic) 1978. We would have to increase the male benefits but I have my doubts as to whether we would be successful decreasing the female benefits. Hence, there could be a retroactive liability. On the other hand, if unisex factors were used from a certain date forward we would have no problem.

Let's discuss at your convenience.

Nevertheless, at the September 1981 meeting, Gibney agreed with the group's opinion that a wait-and-see policy was proper.

As to impact on the fund of a $200 million award, Gibney merely opined that an increase in the contribution rate would be necessary and required and that without the increase there would be an "immediate" impact. If the unisex tables had been implemented in 1978, there would have been no increase in the contribution rate. Gibney testified that although he felt in 1976 that a change would be mandated in the future, he did not feel the system was obligated to change. However, there was no consideration that *prohibited* a change.

9. Dr. David Nye, a finance professor, testified as plaintiffs' expert. Dr. Nye presented the arithmetical illustration that the fund could pay a 200 million dollar judgment in 70 days of excess cash, with excess cash defined

as the difference between current income and current liabilities. Dr. Nye also noted that the additional rate of return needed to amortize the UAAL as currently planned but with a 200 million dollar judgment added would be .32 percent. Dr. Nye pointed out that in 1979, 1980, and 1981, the system suffered huge losses due to bond swaps and that the losses were absorbed without impact although they would be covered in the future. Dr. Nye concluded that the cost of the system is sensitive to the actuarial assumptions made and that a small change in the assumptions has the effect of erasing real losses.

Dr. Nye also opined that the double sex change is the only way to equalize benefits. This opinion may be illustrated graphically:

male/female (less than) female/male—status quo

female/female (less than) female/male—single sex change

female/male = female/male—double sex change

Thus, to achieve monetary equality, computations must be made on the basis of a change of gender of both the male member and the female joint annuitant.

Dr. Nye acknowledged that an immediate cash loss of 200 million dollars would cause a loss of future investment income and that future investment income is an assumption made in determining the actuarial balance of the fund. Dr. Nye also concluded that 200 million dollars is within the bounds of fluctuation of the system, but that the loss must be recognized.

10. On rebuttal, McMullian identified the reason for not developing the no-cost unisex approach before 1983. That reason was because the no-cost approach would result

in a benefit reduction of over one-half the membership of the fund, i.e., the women. Those in charge of the fund did not want to take that step unless they had to.

11. On rebuttal, Tierney opined that cash flow was not an accurate way to measure impact on the fund, that "impact" should be interpreted as "actuarial impact." Tierney also stated that the double-sex change is an inappropriate measure of damages because the expected total value for males and females is different, simply so because of life expectancies differences of the sexes.

CONCLUSIONS OF LAW

Section 703(a)(1) of the Civil Rights Act of 1964, as amended provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . . 42 U.S.C. § 2000e-2(a)(1)

Title VII became applicable to state governments on March 24, 1972, the effective date of the Equal Employment Opportunity Act.

In 1973, the plaintiffs in *City of Los Angeles, Department of Water and Power v. Manhart,* 435 U.S. 702 (1978) filed suit to enjoin the actuarially sound practice of requiring larger contributions to pension funds from women than men. In 1978, the Supreme Court of the United States found that such a practice violated Title VII. This court

has already determined that the practice of the FRS of paying a lower benefit to males who elected one of the joint annuitant options also violates Title VII. Order, March 16, 1984 (document 2713). This ruling will not be disturbed. The purpose of the final hearing was to determine what amount of damages, if any, should be awarded to the plaintiff class. Both *Manhart* and *Arizona Governing Committee v. Norris,* 463 U.S. 1073 (1983) delineate the rules for relief as noted in this court's order of March 16, 1984. The discussion in the March 16, 1984, order is still pertinent today, but calls for updating based on the facts now determined.

After hearing the evidence in this case, there is no longer any doubt at all that the state was on notice at least from the date of *Manhart* that the use of sex-based mortality tables was impermissible. The court will emphasize its finding of March 16, 1984, by saying that the state could not and did not reasonably assume that it could continue to use the sex-based tables. Order at p.14, document 2713.

The state simply did not want to make the politically unpopular decision to reduce the females' benefits. The state chose instead to maintain the discriminatory status quo. The irony of that decision is that the status quo helped rather than hurt women. By contrast, in a hypothetical case, if the state justified maintaining a discriminatory practice favoring men or whites by admitting that the sovereign did not want to make a politically unpopular choice, the public outcry would have been deafening. Discrimination is no less abhorent when it works in favor of a traditionally disadvantaged group. To distinguish *Manhart* on the ground that the California plan discriminated against women while the Florida plan discriminated against men

is untenable. The discrimination is the thing, regardless of victim.

Since the original finding of liability, the Ninth Circuit has decided *Probe v. State Teachers' Retirement System and Teachers' Retirement Board,* numbers 81-5865, 81-5866, slip op. (9th Cir. Jan. 13, 1986), cited by defendants. In *Probe,* the Ninth Circuit found that because of the "open-market" exception in *Manhart,* the defendant fund "reasonably could have assumed that it was lawful to provide an optional annuity system that *reflected plans offered by insurance companies on the open market.*" *Probe* at 13 (emphasis added). This court believes this statement to be a fundamental flaw in the rationale denying retroactive damages. The open market exception of *Manhart* clearly applies to third-party transactions. Footnote 33 of *Manhart* leaves no doubt as to this application by noting the obvious —Title VII governs relations between employers and employees, not between employees and third parties. The *Manhart* court goes further to warn employers that "shell" corporations used to discriminate will not be tolerated. *A fortiori,* discriminatory practices of employers themselves, whether they "reflect" the open market or not, are unlawful.

The polestar for judging the appropriateness of retroactive damages is *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975). *Albemarle* states that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 421. The *Albemarle* presumption in favor of retroactivity allocates to defendants the burden of proving reasons which

would not frustrate the central purpose of the statute. *Manhart* teaches that the *Albemarle* presumption can seldom be overcome, "but it does not make meaningless the district court's duty to determine that such relief is appropriate." *Manhart* at 719.

Plaintiffs injected the issue of "bad faith" as a bar to equity. *Albemarle* holds that, while "bad faith" is not a sufficient reason for denying back pay, if the employer has shown "bad faith," he can "make no claim whatsoever on the Chancellor's conscience." *Albemarle* at 422. *Albemarle* indicates that an employer shows bad faith "by maintaining a practice which he knew to be illegal or of highly questionable legality." *Id.* Plaintiffs maintain that the defendants' wait-and-see policy constitutes bad faith in light of the evidence of the memoranda from Gibney, Boge and Kiesling, the early district court cases, *Manhart,* the industry trends, and the trends in other states.

This court agrees after hearing the evidence that the defendants wait-and-see policy was a product of poor judgment. None of the principals involved in the decision-making harbored any evil intent or design. Rather, it was clear from their testimony that none of them could believe that the Supreme Court meant what it said in *Manhart.* The *Manhart* decision was so contrary to all actuarial principles that the defendants turned a deaf ear to the *Manhart* message. However, this court is not aware of any jurisprudential justification for waiting for the highest court in the land to repeat itself. *Brown v. Board of Education* was given as an example of the Supreme Court rendering further decisions to guide state officials. In all those unanimous implementing decisions following *Brown,* how-

ever, the court never waivered from its clear command to desegregate. Why the defendants thought the Supreme Court would change its mind after *Manhart* has never been explained; perhaps the defendants wanted a direct order from the United States Supreme Court to the FRS to change its policies. And yet, defendants never requested an opinion from the Attorney General of Florida nor even a declaratory judgment from this court or a state court. It is clear that the defendants refused to act on the misplaced assumption that there would be no retroactive damage award. *Manhart* states, almost naively, that "there is no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision." *Id.* at 720, 721. Unfortunately, in Florida that prophecy has proved incorrect.

Plaintiffs are perhaps correct that the double-sex change change method is the only method which would equalize payments between males and females, but equalization is not the goal. All that plaintiffs are entitled to recover are those amounts they would have received if the sex-based tables had not been in effect. *Manhart* at 719, n.36. Thus, this court finds that the unisex method is the proper calculation.

On the other hand the court is not convinced by defendants' argument that proration is a proper method of calculating damages. The state did not use proration when it changed over to unisex tables in 1983. Furthermore, proration has no relationship to the mechanics of the FRS. See, Order, March 1, 1985 (document 2778) and stipulated finding of fact #5. Mr. Tierney merely demonstrated how proration in any given situation would work; he did not

vouch for the applicability of the method. The court understands the notion of "proration;" however, given the method by which retirement benefits are calculated under the FRS, proration has no applicability. Proration presupposes level payment or level contribution. Such is not the case here. where contribution, by the employer, depends on the size of the payroll and where benefits to the employee are based on an average compensation during the five highest income years.

The court is not unmindful of the "difficulty of amending a major pension plan," *Manhart* at 719, n.36, and in that regard it is fair to allow the state officials some time after *Manhart* for study and implementation of legal mortality tables. The evidence is clear that adoption of the unisex table, because it was cost-free, would not, and did not, require legislative action. In May of 1981, Gibney estimated that the unisex tables could have been inaugurated within five months. Plaintiffs' exhibit 25. The court concludes that a five-month delay after *Manhart* is a reasonable time within which to bring the FRS into compliance with the *Manhart* rule. Thus, taking into consideration all the evidence, the court holds that retroactive damages shall not accrue before October 1, 1978.[1]

As to prospective damages, the monthly benefits of all class members and/or their joint annuitants, i.e., those

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[1] The court's prior ruling as to the statute of limitations will remain undisturbed. *See,* Order, document 2778. *Hill v. Metropolitan Atlanta Rapid Transit Authority,* 591 F.Supp. 125 (N.D. Ga., 1984) and the discussion of this "same time frame" requirement is inapposite because that case involves a multiple-plaintiff, *non-class action* suit. The case at bar must be analyzed by reference to the rules governing class actions.

members retiring after 1972 shall be entitled to have their monthly payments adjusted upward under the unisex "topping up" method from the date of judgment forward, positing April 30, 1986, as the judgment date. The court perceives no reason to continue to discriminate against those retirees.

Much was said at trial about the meaning of the phrase "actuarially sound" as it relates to the variables present in the underlying actuarial assumptions. Several principles are clear: (1) It is inappropriate to change an assumption in one circumstance without changing the same assumption across the board. (2) Some assumptions are more important than others, e.g., the mortality assumption is much less important than the rate of return assumption. (3) A relatively slight adjustment in one of the important assumptions, e.g., rate of return, makes a great difference in terms of money. It is also clear that the market-value method of accounting is not appropriate for judging actuarial balance. Further, the assumptions are made taking into account market fluctuations. Thus, it is a conclusion of this court that to use the figures of plaintiffs' expert to analyze the soundness of the FRS would misleadingly skew the figures. On the other hand, it is fair to pit actuary against actuary to test the impact of the award on the soundness of the plan.

In 1984, Tillinghast recommended a one basis point increase in the contribution rate. The state auditor attacked Tillinghast's report as "too optimistic" and recommended a 100 base point increase. The legislature eventually adopted a 25 base point increase. Defendants have offered Mr. Tierney and his firm as experts. If the court accepts

the expert's opinion as of 1984, then the 25 base points represent 24 more than needed to fund the FRS on an actuarially sound basis. The defendants were adamant in denying that this increase created a "slush fund," and this court in no way wishes to intimate an evil intent or motive in approving the increase. But the fact remains that there was an increase 24 base points over what defendants' expert considered necessary. The court appreciates that the contribution increase did not create a lump sum. However, the continued collection through contributions 24 bases points over and above what defendants' own experts have testified would be needed to keep the fund in actuarial balance would *necessarily* generate excess cash in the fund.

It is this court's opinion that the fund has the ability to pay the judgment in this case without a detrimental impact and that the harm will not fall on innocent third parties. The judgment can be paid either by fund reserves or by an increase in the contribution rate. If the latter, the burden will be borne by the employers for whom the plaintiffs worked. If the former, the evidence demonstrates that there are sufficient cash reserves and that the fund would not be bankrupted.

Defendants urge this court to consider the national impact of a retroactive damage award. *Manhart* and *Norris* indicate that a national perspective is appropriate in attending to the equitable nature of Title VII. However, the *Manhart* court was concerned about an overnight change in decisional law that would catch all retirement funds short. *Manhart* was decided eight years ago and *Norris* three years ago. It is inconceivable that any funds would be operated today in violation of *Manhart* and *Norris* since other states, like Florida, have been on notice that

they may face retroactive damage awards. Each case must be judged on its own facts; therefore, the judgment in this case should not have any national impact at all.

Defendants contend that plaintiffs' suit ought to be dismissed as to the individual defendants because EEOC complaints did not name these individuals. Defendants rely on *Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497 (11th Cir. 1985). *Bell* affirms, without discussion, the summary judgment in favor of two supervisors on the basis of *Terrell v. U.S. Pipe & Foundry Co.*, 644 F.2d 1112 (5th Cir., Unit B., 1981). This court had considered *Terrell* in the order determining the proper statute of limitations period. The same rationale is applicable to the issue of dismissal now under consideration; that is, that the EEOC complaint gave sufficient notice to the individual defendants even though they were not specifically named. Thus, these defendants will not be dismissed. The court will note that case has proceeded as an "official capacity" suit rather than a "personal capacity" suit, as evidenced by the automatic substitution of Gilda Lambert for Nevin Smith. *See Kentucky v. Graham*, — U.S. —, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

Based on the foregoing discussion, the court has extracted the following amounts from the stipulation which most nearly meet the amounts to be awarded, and hereby ORDERS that:

1. For the class members retiring after March 24, 1972, the court awards declaratory relief from that date forward to the date of judgment. From the date of judgment forward, the defendants are hereby ordered to adjust the payments to all class members and/or their joint

annuitants upward according to the unisex topping up method. This amount of damages is reflected in the stipulated amount of $32,265.000.00 (stipulated factual finding 43(C)). This amount shall be adjusted downward by positing an April 30, 1986, judgment date.

2. For all class members retiring after October 1, 1978, the court hereby awards back-pay with interest from October 1, 1978, to the date of judgment under the unisex topping up method of calculation. This amount of damages is reflected in the stipulated amount of $12,800,000.00 (factual finding 44(C)). This amount shall be adjusted downward by positing an April 30, 1986, judgment date; it shall be further reduced to reflect October 1, 1978, as the liability cut-off date rather than the April 25, 1978, date.

3. The parties are directed to file a joint proposal within thirty (30) days of the date of this order as to all matters necessary for implementing the award.

DONE and ORDERED this 29th day of March, 1986.

/s/ William Stafford
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

HUGHLAN LONG and S. DEWEY HAAS, individually and on behalf of all retired and present employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, and all joint annuitants thereunder,

Plaintiffs,

v.

THE STATE OF FLORIDA, a governmental body, and THE HONORABLE ROBERT GRAHAM, as Governor of the State of Florida,

Defendants.

TCA
82-1056-WS

ORDER

(Filed March 16, 1986)

This cause was heard by the court on February 8, 1984, on plaintiffs' and defendants' cross-motions for summary judgment. Argument was also heard on several other pending motions. The court having considered the record and having heard the argument of counsel and being otherwise fully advised in the premises, it is ORDERED AND ADJUDGED:

1. Defendants' motion to abstain and dismiss or stay is DENIED as moot.

2. Defendants' motion to dismiss as to plaintiff Long is GRANTED for all claims except the Title VII claim.

Res judicata bars all claims which were or could have been raised in the previous suit. *Allen v. McCurry,* 449 U.S. 90, 94 (1980). Under 28 U.S.C. § 1738, federal courts are required to give the same preclusive effect to a state judgment as the judgment would be given in that state. Federal courts therefore must look to state law in determining preclusive effect. The Florida Supreme Court ruled in *Gordon v. Gordon,* 59 So. 2d 40, 44 (Fla.), *cert. denied,* 344 U.S. 478 (1952), that res judicata "bars a subsequent suit between the parties based on the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised . . . ."

Plaintiff Long in this case raised his Title VII claim in an administrative appeal to the Florida First District Court of Appeal. That court ruled that it had no jurisdiction to hear the Title VII claim. *Long v. Dept. of Administration, Division of Retirement,* 428 So. 2d 688 (Fla. 1st DCA 1983). Until that ruling, the law was not settled as to whether a Title VII action could be brought in that court. Plaintiff was therefore precluded from fully litigating his Title VII claims and cannot be said to have had a "full and fair opportunity" to present his case.

Defendants argue that state law provides a remedy similar to that of Title VII and that, since plaintiff Long could have raised the state law claim and did not, his Title VII claim should be barred as well. Under *Kremer v. Chemical Construction Corp.,* 456 U.S. 461 (1980), it is clear that a plaintiff whose cause has been fully litigated under a state law "at least as broad" as Title VII will be collaterally estopped from relitigating the issue of employment discrimination under Title VII.

However, where a plaintiff has not raised a similar state statute and the claim has not been fully litigated, it

cannot be said that his Title VII claim is collaterally estopped. Moreover, the plaintiff cannot be barred by res judicata from bringing a cause of action which could not have been raised in the previous suit. The fact that another claim could have been raised is not germane.

In the case at bar, the state court had not yet ruled as to its jurisdiction over Title VII claims. Plaintiff Long duly raised this claim but did not obtain a judgment on the merits. Under these circumstances, plaintiff cannot be barred from raising this claim in federal court.

3. Mr. Carl A. Rassler's motion to intervene as plaintiff is GRANTED.

4. Plaintiffs' motion for rehearing on decertification of class "B" is DENIED. This court is under a mandate to protect the interests of the nonappearing class members and to continually reassess the appropriateness of the class certification. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 n. 11 (1978); *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F.2d 457, 462 (5th Cir. 1978). The class as originally stipulated to by the parties and certified by the court included all male persons retired and receiving benefits under options 2, 3, or 4 of Florida Retirement System, all male persons currently employed who are entitled to vested pension or retirement plan benefits, and all persons, male or female, holding rights as joint annuitants under the Florida Retirement System.

Because the Florida Retirement System (FRS) was changed as of August 1, 1983, to conform to the nondiscrimination requirements of Title VII, the court deems it necessary to distinguish the claims of those class members retiring on or after that date. Under Federal Rule of

Civil Procedure 23(c)(1), "[t]he district court has a continuing power" to alter or amend its certification order before decision on the merits. *Elster v. Alexander*, 608 F.2d 196, 197 (5th Cir. 1979). Rule 23(c)(4) gives the court power to divide the class into subclasses. The court hereby modifies its certification ruling to certify class members retiring on or after August 1, 1983, as a subclass in the present action under Federal Rule of Civil Procedure 23(b)(2). The court hereby decertifies those same class members under Federal Rules of Civil Procedure 23(b)(1) and (b)(3).

Class members who retired before August 1, 1983, remain certified under Federal Rules of Civil Procedure 23(b)(1), (b)(2), and (b)(3).

5. Plaintiffs' motion for discovery sanctions is DENIED at this time. The court reserves the right to modify this ruling at a later time if it deems it necessary.

6. Plaintiffs' pendent state law claims are DISMISSED under *Pennhurst State School and Hospital v. Halderman*, 52 U.S.L.W. 4155 (1984).

7. Plaintiffs' claims under 42 U.S.C. § 1983 are DISMISSED. Under the U.S. Supreme Court's rationale in *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979), to allow the plaintiffs to maintain an action under § 1983 on substantive rights created by Title VII would defeat the "comprehensive plan" designed by Congress in enacting Title VII by allowing plaintiffs to "completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress." 442 U.S. at 376.

Plaintiffs also base their § 1983 claim on the equal protection clause of the fourteenth amendment. In *Shinholster v. Graham*, 527 F. Supp. 1318 (N.D. Fla. 1981), this court held that claims for money damages under § 1983 against the state and state officials in their official capacities are barred by the eleventh amendment. Under the test laid down in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), defendants have qualified immunity in their individual capacities unless their actions violated "clearly established statutory or constitutional rights." Because, in *Long v. Department of Administration, Division of Retirement*, 428 So. 2d 688 (Fla. 1st DCA 1983), the state court held that FRS was not violative of the fourteenth amendment, the defendants could not have violated clearly established law.

Of the remedies available under § 1983, only prospective injunctive relief remains. However, according to plaintiffs' brief, their prayer for future relief is considered "retroactive" because it will require retroactive funding of the FRS contribution base. Prospective injunctive relief is therefore inappropriate, and plaintiffs' claims under § 1983 are dismissed as unredressable.

8. Defendants' motion for dismissal for lack of Article III subject matter jurisdiction is DENIED.

9. Defendants' motion to dismiss as to plaintiff Haas is DENIED.

10. Also before the court for consideration is the motion of Vertie V. Prater to withdraw her request for exclusion from the class. Mrs. Prater states that she did not understand her rights when she asked to be excluded, and, now that she does understand, she would like to be

allowed to participate. Defendants oppose the motion on the grounds that Mrs. Prater's reasons for wishing to withdraw her request are not exceptional and could easily apply to all other potential class members who have opted out. Defendants contend that a precedent would be set which would allow a number of potential class members to opt back in. They therefore do not consent to her reinstatement and claim they would be prejudiced thereby. The only case cited to the court on this issue allowed the class member to reenter the class. In that case, the member's reentry was stipulated to by the parties, and the court determined there would be no prejudice to either side. Under the law pertaining to Rule 23(b)(3) class actions, Mrs. Prater had thirty days in which to determine her rights before opting out. Because defendants oppose this motion and claim prejudice to their case, the motion by Mrs. Prater to withdraw her request for exclusion is DENIED.

11. Plaintiffs' motion for summary judgment under Title VII is GRANTED as to liability. The court hereby awards declaratory relief only.

12. The determination of whether this court has the discretion to award damages in this case rests on the question of the preclusive effect of the Supreme Court's "prospective-only" decision in *Arizona Governing Committee v. Norris*, — U.S. —, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 (1983). Retroactive damages were denied in *Norris* for two main reasons, one given in Justice Powell's opinion and one in Justice O'Connor's opinion. Writing for the majority on damages (with Justice O'Connor concurring separately), Justice Powell emphasized that the question

of whether Title VII would be applied to an employer providing a retirement benefit program through private insurance companies had not been decided by the Court. *City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978), had expressly said: "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefits which his or her accumulated contributions could command in the open market." *Norris*, 77 L. Ed. 2d at 1250, quoting *Manhart*, 435 U.S. at 717-718. Thus, Justice Powell concluded that, because of this open market exception, employers had no previous notice that third-party insurer programs could be illegal. He therefore denied retroactive damages, stating that "[a]n employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market." 77 L. Ed. 2d at 1263.

Justice O'Connor, however, did not agree that the Court's holding concerning third-party insurers was unforeshadowed. She found that "[d]espite Justice Powell's argument, the result in *Manhart* is not distinguishable from the present situation." 77 L. Ed. 2d at 1264. She, on the other hand, was concerned that retroactive damages would "jeopardize the entire pension fund," and therefore made the award prospective only. Moreover, she was convinced that a retroactive holding was not necessary to force pension plan administrators "who may have thought until our decision today that Title VII did not extend to plans involving third-party insurers," to conform to the Court's decision. 77 L. Ed. 2d at 1265.

The issue of "open market" annuities, on which the *Norris* denial of retroactive damages centered, is not applicable to the case at bar. The Florida Retirement System is employer-operated and mandatory for its employees. Thus, although the precise issue of unequal benefits was decided in *Norris,* the court finds that the denial of retroactive damages in *Norris* is not preclusive in this case.

In *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975), the Supreme Court established a strong presumption in favor of back pay awards in Title VII cases: "Back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421. The court went on to say that good faith is not a defense to a Title VII violation, and a showing of bad faith is not required. *Id.* at 422-23.

Although recognizing the presumption that retroactive damages are appropriate in Title VII cases once liability is established, both *Norris* and *Manhart* advised caution in the award of damages. "The Albemarle presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district court's duty to determine that such relief is appropriate." *Manhart,* 435 U.S. at 719. In denying retroactive damages, the Court in *Manhart* gave three grounds for the action: (1) because it was a "marked departure from past practice, . . . conscientious and intelligent administrators . . . may well have assumed that a program like the Department's was entirely lawful"; (2) "[t]here is no reason to believe that

the threat of a back pay award is needed to cause other administrators to amend their practices to conform to this decision"; and (3) "[r]etroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties." *Id.* at 720-23. On these three grounds, the court denied retroactively "[w]ithout qualifying the force of the Albemarle presumption in favor of retroactive relief. . . ." *Id.*

Justice O'Connor, in her *Norris* concurrence, gave a similar analysis, using the guidelines set forth in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). *Chevron* gave three criteria: (1) whether the decision establishes "a new principle of law, either by overruling clear precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) "whether retroactivity will further or retard the operation of the statute"; (3) "whether retroactive application would impose inequitable results." These criteria are substantially similar to the criteria used in *Manhart.* The mandate of the Supreme Court requires these criteria to be applied in determining the appropriate remedy in this case.

The precedent in this circuit for back pay awards was clearly established in *James v. Stockham Valves & Fittings Company,* 559 F.2d 310, 357 (5th Cir. 1977), and *Pettway v. American Cast Iron Pipe Company,* 494 F.2d 211, 252-53 (5th Cir. 1975), *modified on other grounds,* 576 F.2d 1157 (5th Cir. 1978). *Bonner v. Prichard,* 661 F.2d 1206 (11th Cir. 1981). The current Fifth Circuit has recently reaffirmed these earlier rulings in *Carpenter v. Stephen F. Austin State University,* 706 F.2d 608 (1983). Citing *James, Pettway,* and *Albemarle,* the Fifth Circuit wrote:

> The statutory mandate of Title VII does not automatically require the court to exercise its equitable powers and award back pay in all circumstances; nevertheless, as the district court correctly observed, the remedial purposes of Title VII command back pay relief in all but "special circumstances." The court's discretion to deny back pay, once the class has been shown to have sustained economic loss, is "narrow."

Id. at 631.

Defendants contend that the *Norris* decision and not *Manhart* constituted the first notice that the Florida Retirement System benefit plan violated Title VII prohibitions. The *Manhart* decision held that an employer-operated pension fund that required women to make larger contributions than men to obtain equal benefits violated Title VII. The Court recognized that the pension system was founded on actuarily sound life expectancy tables. It, however, determined that sex could not be the discriminating factor in determining life expectancy. The Court found that Title VII focused on the individual and not the class, and that classifications in the employment context on the basis of sex, no mater how sound, were illegal.

> The statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." 42 USC § 2000e-2(a)(1) [42 USCS § 2000e-2(a)(1)] (emphasis added). The State's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.

435 U.S. at 708.

> An employment practice that requires 2,000 individuals to contribute more money into a fund than

> 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for that person's sex would be different."

435 U.S. at 711.

The Florida Retirement System calls for equal contributions but distinguishes between men and women in benefit levels under three of four options. *Norris* involved a similar situation. Defendants therefore claim that *Norris* and not *Manhart* decided the principle of law that applies to this case. In deciding *Norris*, however, the majority of the Supreme Court relied almost exclusively on the Court's decision in *Manhart*. Justice Marshall quotes extensively from the *Manhart* language, as does Justice O'Connor in her concurrence:

> The court in Manhart found Title VII's focus on the individual to be dispositive of the present question. Congress in enacting Title VII intended to prohibit an employer from singling out an employee by race or sex for the purpose of imposing a greater burden or denying an equal benefit because of a characteristic statistically identifiable with the group but empirically false in many individual cases. See Manhart, 435 U.S., at 708-710, 55 L. Ed. 2d 657, 98 S. Ct. 1370.

77 L. Ed. 2d at 1264. The dissent in *Norris* does not challenge the majority finding on this issue. Rather, the dissent disagrees with the third-party insurer liability finding.

Like the Court in *Norris* and every other court but one that decided the issue, I see no meaningful distinction between discrimination at the pay-in stage as in *Manhart*

and in the pay-out stage as in the case at bar. In either case, there is discrimination in compensation for equal work on the basis of sex, as prohibited by Title VII. As *Manhart* said, "[O]ne cannot say that an actuarial distinction based entirely on sex is 'based on any other factor than sex.' Sex is exactly what it is based on." 435 U.S. at 712-13 *quoting* 553 F.2d 581, 588 (9th Cir. 1976). *Manhart* condemned the use of sex-based actuarial tables. Even though the particular facts of that case dealt with the pay-in stage only, the state could not have reasonably assumed, in light of the Court's rationale and explicit language, that it could nevertheless continue to use sex-based tables at the pay-out stage.

As early as 1972, the Equal Employment Opportunity Commission promulgated federal regulations under "Guidelines on Discrimination Because of Sex," stating: "It shall be an unlawful employment practice for an employer to have a pension or retirement plan which . . . differentiates in benefits on the basis of sex." 29 C.F.R. § 1604.9(f) (1980). Suits were filed concerning this issue as early as 1974. (*See Spirit v. Teachers Insurance & Annuity Association,* 691 F.2d 1054, 1067 (2nd Cir. 1982).) The Supreme Court's decision in *Manhart* came down in 1978. After *Manhart,* as Justice Marshall notes in *Norris,* every lower court but one found liability on this issue. Thus, neither the Supreme Court's decision on this issue in *Norris* nor this order today establishes a new principle of law or a marked, unforeshadowed overruling of precedent. Under the first criterion, then, retroactive damages would not be prohibited.

Regarding the second criterion, Justice O'Connor explained: "Manhart held that a central purpose of Title

VII is to prevent employers from treating individual workers on the basis of sexual or racial group characteristics." *Norris*, 77 L. Ed. 2d at 1265. It is difficult to see how awarding retroactive damages in this case would "retard the operation" or "frustrate the purpose" of the statute.

The third criterion requires the court to consider the impact of retroactive damages on the pension fund. Although the necessity of using public funds to provide damages is not sufficient reason to deny back pay awards, *Carpenter*, 706 F.2d at 632, *Norris* and *Manhart* both compel this court to consider whether the award would devastate the pension fund and harm "innocent third parties." The information before the court at this time is not sufficient for a decision on this point, and the parties are therefore requested to prepare appropriate memoranda. Defendants, according to their letter of February 14, 1984, were to provide the court with the results of their research by March 10. Defendants are directed to do so by March 23. Plaintiffs shall have ten days thereafter to respond.

DONE AND ORDERED this 15th day of March, 1984.

/s/ William Stafford
Chief Judge

Florida Retirement Systems Bulletin
September 1984 Vol. 10, No. 1

1984 RETIREMENT LEGISLATION

The 1984 Legislature introduced 99 bills which directly or indirectly affected retirement and were of interest to the Division of Retirement. Of the 99 bills, 17 passed. One bill was a composite of 14 bills, providing amendments to 20 separate provisions of retirement law. The following summary will provide you with general information about the legislation which passed that may be of interest to you.

Amendments Affecting Members' Benefits

1. Chapter 84-266, Laws of Florida—An amendment limits the accumulated annual leave that may be used in the Average Final Compensation to 500 hours and prohibits the use of bonuses. This legislation will not be effective until January 1, 1985, and will apply to FRS members who retire on and after that date.

2. Chapter 84-266, Laws of Florida—Amendments were made to the requirements for the purchase of military service for retirement credit and are effective July 1, 1984. Military service credit, which may be bought under 2 separate provisions, was amended in both instances.

a. **Credit for Military Leave-of-Absence** is now worded to agree with the Federal Veteran's Reemployment Rights Act, 38 U.S.C. S.2021 which provides that any person who leaves a position of employment, other than temporary,

to enter the armed forces of the U.S., receives a satisfactory completion of service certificate, and applies for reemployment within 90 days after discharge shall, upon reemployment, be considered as having been on furlough or leave-of-absence, whether or not a military leave-of-absence was granted by the employer. The member may now receive more than 4 years of military service credit if the additional years were required for the convenience of the Federal Government; the military service does *not* have to be wartime; there is no longer a restriction against receiving credit for military service under the Florida Retirement System for the same period of military service used in another pension system; and the member must pay the required employee and employer contributions for the period of the leave, plus interest.

b. **Wartime Military Service Credit** may be purchased by the member after 10 years of membership in the Florida Retirement System. The 1984 legislation allows members who are also serving in the U.S. Reserve Forces to purchase military service credit even though the member is eligible to receive service credit in another pension plan for the same service. However, the member must pay the total actuarial cost of the increased benefit resulting from the use of military service credit.

3. Chapter 84-266, Laws of Florida—Past service credit for employment in a Multiple Offender Project administered by a State Attorney may be purchased under certain conditions.

IN MEMORY OF A FRIEND

Max Kelley, a Division of Retirement employee for 22 years, died on June 14, 1984, after a brief illness. He was a native of Urbana, Illinois, and a Tallahassee resident for 34 years.

As Special Projects Coordinator, Max conducted seminars on retirement throughout the state, helping many members and employers to better understand the system. He also conducted workshops and orientation sessions for employees of the Division.

His career with the Division began under the old Teacher's Retirement System in August 1961 as an administrative assistant. When the Division of Retirement was created in 1971, he became Chief of the Bureau of Benefits, a position he held until being appointed as Special Projects Coordinator in 1979. His leadership and friendship will be missed, especially by the employees of the Division and by the many retirees and members under the FRS who knew him.

Amendments with Fiscal Impact

4. Chapter 84-266, Laws of Florida—As a result of the 3-year actuarial review, the rates of retirement contributions for some classes of membership will increase and others will decrease. All rate changes are effective October 1, 1984, as follows:

Regular Class	12.24%
Special Risk Class	14.67%
Special Risk Administrative Support	13.09%
Judicial	21.79%
Governor, Lt. Governor, Legislative, Cabinet, States Attorney	10.98%
Elected County Officials	*16.97%

*An intervening rate of 20.25% will be charged July 1, 1984-September 30, 1984 for elected county officials. This is the result of 1983 legislation.

5. Chapter 84-266, Laws of Florida—Provisions requiring the forfeiture of retirement benefits by public officers and employees who are found guilty or admit to certain offenses involving a breach of public trust were adopted. The specified offenses are:

a. The committing, aiding, or abetting of an embezzlement of public funds;

b. The committing, aiding, or abetting of any theft by a public officer or employee from his employer;

c. Bribery in connection with the employment of a public officer or employee;

d. Any other felony specified in Chapter 838;

e. The committing of an impeachable offense;

f. The committing of any felony by a public officer or employee who, willfully and with intent to defraud the public, or the public agency for which he acts or in which he is employed, of the right to receive the faithful performance of his duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or for some other person through the use or attempted use of the power, rights, privileges, duties, or position of his public office or employment position.

The amendments included the methods by which the retirement systems will be notified of possible forfeiture and the appeal rights for any employee whose benefits are forfeited.

6. Chapter 84-266, Laws of Florida—Actuarial studies of the Florida Retirement System Trust Fund are now required every 2 years instead of every 3 years. This will give the Division and The Legislature the ability to respond more quickly if funding problems are observed. In addition, the new law mandates the following changes:

a. The valuation of plan assets will be based on a 5-year averaging methodology such as that specified in the U.S. Department of Treasury Regulations or a similar accepted approach designed to attenuate fluctuations in asset values.

b. A narrative explaining the changes in the covered group over the period between actuarial valuations and the impacts of those changes on actuarial results.

c. Where substantial actuarial changes in actuarial assumptions have been made, the study shall reflect the results as of the current date based on the assumptions utilized in the prior actuarial report.

d. An analysis shall be included of the changes in actuarial valuation results by the factors generating those changes and shall include a reconciliation of the current actuarial valuation results with those from the prior valuation.

e. Measures of funding status and funding progress designed to facilitate the assessment of overall solvency of the system will be included and will be used consistently in all actuarial valuations.

f. Any increase in unfunded liability under the system arising from significant system amendments or changes in assumption will be amortized over 30 plan years, and any net increase in unfunded liability arising from experience losses or gains, or supplemental retiree benefit increases, shall be amortized within 15 plan years.

Amendments Affecting the Elected State Officers' Class (ESOC)

7. Chapter 84-11, Laws of Florida—Members of the Elected State Officers' Class (ESOC) who are employed

in two positions, one of which is not covered by the ESOC, may retire from the non-ESOC position and continue employment in the ESOC position, receiving retirement benefits and compensation simultaneously. Those members of the Elected State Officers' Class who applied for retirement under the provisions of a similar bill in 1983, but who retired from the same position in which their employment continued, were "unretired" by this legislation.

8. Chapter 84-266, Laws of Florida—An officer of the ESOC whose term was or is shortened by legislative or judicial apportionment may purchase service credit after the term of office is completed for the length of time he would have served had the term not been shortened.

9. Chapter 84-266, Laws of Florida—Effective July 1, 1984, members of the ESOC may upgrade service earned previously as an elected county prosecuting attorney to the ESOC with a value of 3% of average final compensation for each year that is creditable, upon payment of the required contributions.

In order to upgrade service, the elected officer must have been filling the elected office prior to the existence of the Florida Retirement System or prior to the position's inclusion in the Elected State Officers' Class. The value of the retirement credit received for such service would increase from the value earned as a regular member the value earned in the ESOC, upon payment of additional contributions and interest.

Legislation passed in 1983 changed the method by which the cost in computed for purchasing service that is upgraded to the ESOC, effective July 1, 1984. The

member must now pay the difference between the total employee and employer contributions actually paid on the gross salary received, but not less than $1,000 per month, and the total contribution rate required at the time the service was rendered for the class of elected state officers' service being purchased, plus required interest. Any service earned prior to July 1, 1972, may be purchased at the applicable rates in effect July 1, 1972.

Amendments Affecting Special Risk Members

10. Chapter 84-266, Laws of Florida—The definition of continuous service was amended so that certain law enforcement officers will not have a break in service (which causes the member to be unable to retire regardless of age when retiring with 25 continuous years of service) if:

a. the employee was a law enforcement officer as defined in S. 121.0515(2)(a), while a member of the State and County Officers and Employees' Retirement System or the Highway Patrol Pension System, who resigned and was reemployed in a law enforcement position within 12 calendar months of resignation; or

b. the employee was a state-employed law enforcement officer who resigned to run for an elected law enforcement office and was reemployed as a state law enforcement officer or elected to a law enforcement position within 12 months of the resignation.

The member will not receive retirement service credit for the interim period of time not employed.

11. Chapter 84-266, Laws of Florida—Effective July 1, 1984, the Division of Retirement will no longer require the submission of a copy of the special risk certification required in accordance with S. 943.14. F.S. for law enforcement and correctional officers. The member must continue to satisfy the requirements of the Criminal Justice Standards and Training Commission, and both the employee and employer must verify that the member is required to be certified on the application.

12. Chapter 84-266, Laws of Florida—Current law is amended effective July 1, 1984, to include in the Special Risk Class certified correctional officers who are the supervisor or command officer of a member or members who have special risk responsibilities.

13. Chapter 84-266, Laws of Florida—The death benefits provided to the child of a law enforcement officer or firefighter as provided in Chapter 83-115, Laws of Florida were amended to be effective July 1, 1980, and it also provides for the cessation of educational benefits after the child's 25th birthday. The Division of Retirement does not administer these death benefits.

Amendments Affecting Retired Members

14. Chapter 84-266, Laws of Florida—The provisions affecting reemployment were amended to be effective next year, July 1, 1985. At the time, retirees will be prohibited from employment with any agency participating in the Florida Retirement System for 12 calendar months following retirement. If reemployed during this period, the retiree must suspend his retirement benefit. After 12 months, the retiree may be

reemployed with no limitations. Effective July 1, 1985, the employer of any retiree filling a regularly established position must pay retirement contributions equal to the unfunded liability portion of the regular class membership, of currently 5.71%. The reemployment provisions are applicable to the Florida Retirement System, Teachers' Retirement System, State and County Officers and Employees' Retirement System and Highway Patrol Pension System, and those who retired under S. 112.05 F.S.

15. Chapter 84-266, Laws of Florida—Retirees are allowed, effective July 1, 1984, to change their joint annuitant under option 3 or 4, whether or not the joint annuitant is living. If living, the joint annuitant must be notified of the change. The retiree's benefit will be recalculated to be the actuarial equivalent of the member's current benefit, based on the age of the member and the new joint annuitant at the time of the change.

16. Chapter 84-266, Laws of Florida—As special group of retirees are eligible to receive a supplementary cost-of-living adjustment which shall be made in October of 1984. In order to be eligible the retiree must:

a. have retired prior to January 1, 1976.

b. not be receiving nor eligible to receive Social Security.

c. receive a monthly benefit as of July 1, 1984 of less than $1,000.

d. have a minimum of 10 years of service credit.

The Division identified approximately 2,000 retirees who should be eligible for this increase, and will send these retirees an application. The remaining possibly eligible retirees will receive a notice requesting they contact the Division if they think they are eligible based on the criteria.

The adjustment received will be a percentage of the October 1, 1984 benefit based on years of service prior to retirement and years that have elapsed since retirement. The percent multiplied times the October benefit will be as follows:

a. A retiree with 30 or more years of service will receive 1% multiplied by the number of complete years that have elapsed between retirement and July 1, 1984;

b. A retiree with 20, but less than 30 years of service will receive 0.9% multiplied by the number of complete years elapsed between retirement and July 1, 1984;

c. A retiree with 10, but less than 20 years of service will receive 0.8% multiplied by the number of complete years elapsed between retirement and July 1, 1984.

17. Chapter 84-266, Laws of Florida—All retirees must be provided with the opportunity to rejoin the health insurance plan offered by their former employer. This amendment provides that the employer must notify not later than January 1, 1985, all retired former

personnel or their eligible dependents, who shall have until April 1, 1985, to accept or reject, in writing, participation in the employer's group insurance or self-insurance plan.

ACTUARIAL VALUATION COMPLETE

The actuarial firm of Tillinghast, Nelson and Warren, Inc., of Atlanta, has recently completed the three year actuarial valuation of the Florida Retirement System (FRS). This review is required by law and is designed to reveal the financial condition of the Florida Retirement System Trust Fund.

Complex Formula

Simply put, an actuarial valuation is a set of complex calculations used to determine whether or not a retirement system has or will have sufficient funds to pay all retirement benefits promised. In making the calculations, actuaries usually identify separately the liability for the benefits already earned for retirees as of the valuation date (usually known as "actuarial accrued liability") and the liability for the future benefits that will be earned by employees (referred to as "normal cost"). The logic behind this valuation method is easy to understand. By identifying the cost of the current benefits and assuming that the cost will be met in the future through contributions designated for that purpose, the funding problem can be isolated to the unfunded liability for prior normal costs which were not paid, otherwise known as the unfunded actuarial accrued liability.

Unfunded Actuarial Accrued Liability (UAAL)

Using factors such as return on investments, salary increases, payroll growth, terminations, disability, mortality, and others, the actuaries calculate the cost of benefits that will be earned from the date of the valuation into the future. This cost is usually expressed as a contribution rate or percentage of payroll for each member of the system and, as already mentioned, is referred to as the "normal cost." Then, using similar factors, the actuaries determine the cumulative cost for all past years and calculate the amount of money there should be in the retirement fund as of the valuation date if sufficient contributions had been paid for all years in the past, including interest that would have accumulated. The difference in the calculated amount that should have been paid and the actual amount that is in the retirement fund is called the unfunded actuarial accrued liability (UAAL). A payment schedule expressed as a percentage of each member's salary is designed by the actuaries to amortize or pay-off this unfunded liability, over a period not to exceed 30 years, as provided by law.

Applying the basic techniques just outlined, the actuarial firm of Tillinghast, Nelson and Warren, Inc., performed an actuarial valuation of the FRS and found that the unfunded actuarial accrued liability of the FRS as of July 1, 1983, was $6,503,123,000. Three years earlier, in 1980, this liability was $4,323,005,000.

Most of the increase in the UAAL was expected and was caused by the following:

1. There was an expected increase due to the payroll growth method used to amortize the unfunded

liability. This method, which was adopted by the Legislature in 1978, anticipates an increase in the UAAL for approximately 20 years and then a rapid decrease as the active payroll grows in size until the contributions are sufficient to not only cover each year's interest on the liability, but to begin amortizing the principal as well. (See further explanation in Section titled "Projection of UAAL").

2. A very substantial experience loss occurred over the three-year period since the last actuarial review in 1980. This loss in mainly attributable to salary increases for FRS members which were in excess of those assumed and to employee turnover which was much lower than assumed.

3. There were changes in the actuarial assumptions which resulted in a net increase in estimated actuarial liabilities, e.g., mortality experience was such that retirees were living longer than had been assumed.

Table 1 summarizes the assumed experience over the last three years with respect to certain economic factors.

TABLE 1

	1980 Assumption	1983 Assumption	1980-83 Actual Experience 80-81	81-82	82-83
Rate of Investment Return	8.50%	9.00%	9.60%	10.19%	9.68%
Individual Member Salary Increase Rate	8.00%	7.50%	11.60%	11.40%	9.70%
Total Payroll Growth Rate	6.75%	7.00%	12.20%	11.80%	11.30%

All rates are average compound annual rates.
Investment returns exclude realized and unrealized gains and losses.

New Contribution Rates

The end result of the actuarial valuation of the FRS is the development of contribution rates for each class of membership which are sufficient to pay the current and future retirement benefits earned by members and also to amortize the unfunded actuarial accrued liability in 30 years. The adequacy of these rates is dependent on several factors that were assumed in the course of the actuarial valuation, the three most critical being: 1) the assumption that the size of the membership payroll will grow by 7% per year; 2) the assumption that the long-term investment return of the retirement trust fund will equal 9% compounded annually; and 3) the assumption that salary increases will progress at 7.5% compounded annually. Table 2 shows the current and new rates of employer contributions as determined by the valuation.

TABLE 2

Contribution Rates by Membership Class

Membership Class	Contribution Rates on Gross Salary	
	Current Rate	New Rate*
Regular	10.93%	11.99%
Special Risk	13.95%	14.42%
Special Risk Administrative Support	11.14%	12.84%
Judicial	22.55%	21.54%
Legislative/Attorneys/Cabinet	19.30%/20.95%/21.03%	10.73%
County Elected	19.30%	16.72%

**The new rates will be effective October 1, 1984. The 1984 Legislature adopted rates .25% greater than those proposed above to guard against unexpected increases in the UAAL.*

Projection of UAAL

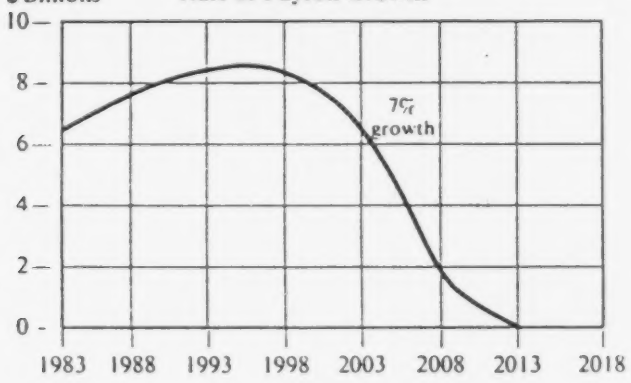
The UAAL is an interest-bearing obligation, similar to a mortgage. The UAAL represents a sum of money which, if actually deposited in the retirement trust fund and earning interest at the assumed rate, would, along with current assets and future normal cost contribution, be exactly sufficient to pay all future benefits for current members (if all assumptions are realized). If the UAAL were an asset of the trust fund, it presumably would be earning interest at the assumed 9% rate; since, however, it is a debt, it must be treated like a mortgage—by the payment of accrued interest.

Table 3 shows the projected growth of the UAAL.

TABLE 3

Unfunded Actuarial Accrued Liability

Amortization Pattern as Function of Annual Compound Rate of Payroll Growth



The following observations may be made from the table:

1. The UAAL grows for a number of years during which the payroll contributions are insufficient to meet each year's 9% interest requirement, thereby causing it to increase by the amount of the unpaid interest. If the actuarial assumptions are realized, the UAAL will reach its maximum in 1995, at which time the current UAAL of $6.50 billion will have increased to $8.66 billion.

2. After 20 years, the UAAL is approximately equal to the amount on July 1, 1983. This means, in effect, that only accrued interest has been paid during those 20 years and that the discharge of the entire principal amount occurs over the last 10 years—by which time the payroll is assumed to have grown to such proportions that the application of the contribution percentages produces rapid funding of the principal. Amortization of the entire principal is to be accomplished by the year 2013.

Conclusion

The Florida Legislature has made provisions for funding the FRS in recent years by increasing employer contributions to meet funding needs and to guarantee benefits to current and future retirees. In 1985 another actuarial review will be conducted to check the financial condition of the Florida Retirement System to determine if any further action is needed by the Legislature.

The Florida Retirement Systems Bulletin is an official publication of DEPARTMENT OF ADMINISTRATION, Division of Retirement. Prepared by: Jenny Bryant,

Mary Beth Brewer, Mickey Campbell and Ron Poppell; the Research, Education & Policy Section.

This publication was promulgated at a cost of $27,871.95 or $.064 per copy for 430,000 copies to inform members of the policies and operations of the Florida Retirement System.

State of Florida

Department of Administration

Division of Retirement

MAILING ADDRESS
530 Carlton Building
Tallahassee, Florida 32304

LOCATION
Cedars Executive Center
2639 North Monroe Street
Tallahassee, Florida

November 16, 1976

MEMORANDUM

TO: Mr. Robert L. Kennedy, Jr.
State Retirement Director

FROM: L.J. Gibney
State Retirement Actuary

SUBJECT: 1977 Valuation—Mortality

The purpose of this memorandum is to bring you up-to-date as to what is happening in the industry with regard to the appropriateness of a mortality assumption to be employed in the valuation process.

It has only been very recently that there has been sufficient data available to justify mortality tables as a general valuation tool based primarily on the

mortality experience under non-insured plans. The valuation table we are currently using, 1971 Group Annuity Table, may not be appropriate for the valuation of non-insured pension plans. The 1971 Group Annuity Mortality Table was intended for use as a general valuation standard, and this raises the question as to whether this table or some modification of it should be used for valuing non-insured plans or whether a separate table appropriate for the non-insured pension plans should be developed.

One valid reason for using the 1971 Group Annuity Mortality Table as a valuation basis for non-insured plans has been that the variations in the mortality rates are relatively less important than the experience variations of other factors such as the rate of interest, rate of future salary increases, incidence of disability retirement, rate of withdrawl, average age at date of retirement, etc. Under the 1974 Pension Reform Act, the actuary is required to employ his best estimate and the use of a particular table because any variations that are to insignifiant may not be considered as a valid reason.

Because of the general thrust taken by the Equal Employment Opportunity Commission, there is now a very strong possibility that actuaries will no longer be permitted to use mortality standards which provide for the use of a differentiation in rate of mortality by sex.

The use of mortality rates on a single "unisex" basis has been found quite practical for non-insured plans which have been shifting over to the use of approximate benefit factors anyway and thus getting away from the type of precise actuarial equivalence for early retirement and optional benefits.

Federal government pressure for treating males and females in exactly the same manner recalls to mind the fact that the government took a similar position in the 60's with respect to race and imposed a requirement that insurance companies charge exactly the same premium irrespective of race, in spite of the fact that there is difference in mortality between the races.

Basic data:

For the pensioner mortality experience underlying the new table, the mortality experience includes 130,141 deaths of which 118,942 deaths were at attained age 65 and over. This is 53% more deaths than used in 1971 GAM for males and 800% more deaths than used in 1951 Table for males. The number of pensioner deaths used as a basis for the new table assures sufficient statistical significance to warrant the use of the table as a pension valuation standard.

Mortality Experience by Sex:

All of the available statistics seem to point in the direction of females having a significantly better mortality experience than males. The factor of sex is important to the extent that a higher female content in a group can lead to more favorable mortality experience of the group and significantly higher pension costs.

Future Mortality Improvement:

The composite experience data underlying the new table was reduced 10% to reflect the fact that this would be the case 17 years hence if the trend of a 6% reduction over a 10-year period continued. Since the mid-year

point was calendar year 1967, this brings into the table the future mortality improvements that can be anticipated up to calendar year 1984.

Comparison With Other Mortality Tables:

Several different tables have been used in the past but the comparision which follows selects only those that are widely used.

Comparative Male Mortality Rates Per 1,000

Age	Ga-1951 Male	1971-GAM Male	UP-1984 Male
35	1.37	1.12	1.51
45	3.58	2.92	3.77
55	10.44	8.52	9.88
65	24.42	21.26	24.85
75	62.43	55.29	57.78

Comparative Female Mortality Rates Per 1,000

Age	Ga-1951 Female	1971-GAM Female	UP-1984 Female
35	.93	.65	1.14
45	1.99	1.40	2.33
55	4.65	3.26	6.20
65	13.60	9.56	15.51
75	44.31	32.39	37.67

As noted above, the mortality rates on the new table are significantly higher than our current valuation standard, for both male and female; and, consequently, annuity values would be lower which, in effect, would reduce our liability somewhat.

Value of $1 A Year Payable Monthly

Age		Male	Female
55	1971 GAM, 3½%	$14.98	$17.33
	UP-1984, 3½%	14.59	16.35
65	1971 GAM	11.14	13.45
	UP-1984	10.89	12.75
75	1971 GAM	7.51	9.19
	UP-1984	7.36	9.03

Unisex Factors and Equal Benefits:

The use of age adjustments to develop separate sex-segregated mortality tables, while customary in the past, may not develop socially acceptable results which provide actuarially equivalent benefits for early retirement or survivorship options. Appended is a paragraph from "Decision No. 72-1919" of the Equal Employment Opportunity Commission dated June 6, 1972 dealing with this question.

The EEOC's concern is that when actuarial tables are sex-segregated this frequently results in the payment of different periodic pension benefits to males and females under the guise of "actuarial Equivalence". Any such difference in benefits paid would constitute a violation of the Civil Rights Act of 1964, and thus the Commission requires that the periodic pension benefits paid to male and female employees in equivalent circumstances must be equal in amount.

As to the early retirement reductions, we already use a composite figure, 5% per year reduction for each year short of normal retirement date and thus we are making no distinction between the sexes.

We are, however, making a distinction when the survivorship option is selected. The sex-segregated actuarial tables charge a male employee electing survivorship rights on behalf of a female spouse considerably more than the charge required when a female employee elects on behalf of a male spouse.

The UP-1984 Table has been developed as a composite mortality table which is appropriate for the valuation of pension plans covering groups having a 10% to 30% female content. The table can be set backward or forward to reflect differing percentages of females content and thus be deemed an appropriate valuation standard.

Composite mortality tables employed with actuarial factors independent of sex are referred to as "Unisex Tables" or "Unisex Factors". Such tables have been employed in the actuarial valuations for some of the nation's largest employers and "Unisex Option Factors" have been developed on the basis of age setback to reflect the different sex content. The method has been found satisfactory in practice and the results are in full compliance with both the letter and the spirit of the 1964 Civil Rights Act.

Conclusion:

A change from one mortality basis to another is generally of lesser importance than a ¼% change in the valuation interest rate. Also, the other assumptions are considerably more important than the mortality assumption.

I would not bring this to your attention if it were not for the pressure of the Federal government via the EEOC to have equal benefits without regard to sex. Since our option factors make this distinction, it would seem prudent to resolve our course of action before the 1977 valuation is started. If we do nothing and continue the use of 1971 GAM Table, we will no doubt have to come up with new option tables based on a more realistic interest assumption. Is it possible a year or two later, pressure would build such that we would be forced to go to a Unisex Table? If this were the case, then we would have to go through the expense of generating unisex option factors to replace ones that are but a year or two old.

Recommendation:

In light of the strong possibility of the Federal government mandating the use of such tables, I would recommend we consider going to the new basis for option reduction factors and resolve this differential in the benefits between the sexes once and for all. I would also recommend that in the valuation process, we maintain the distinction between the sexes so that there would not be any dispute upon resultant costs.

As I noted earlier, use of a new table will have only a slight effect on the overall valuation process when one considers the greater impact of the other assumptions employed.

LJG:pl

NOTE: The memoranda is a summary of a paper entitled "Non-Insured Pension Mortality" by William W. Fellers and Paul H. Jackson of the Wyatt Company. It was presented at the Joint Conference of Actuaries in Public Practice and the Society of Actuaries, May 22, 1975.

A paragraph from "Decision No. 72-1919" of the Equal Employment Opportunity Commission dated June 6, 1972.

> "The pension plan, incorporated in the bargaining agreement, provided a smaller reduction of the pension benefits for females who retired early than males who retired early. This followed from the use of separate actuarial tables for males and females in computing the early retirement benefits. Since there was no conceivable non-discriminatory justification for the use of sex-segregated actuarial tables to determine the reduction of an employee's pension upon early retirement, the pension plan discriminated against its male employees with respect to terms and conditions of their employment within the meaning of the Civil Rights Act.

LJG:pl

11/19/76

STATE OF FLORIDA
Department of Administration

Division of Retirement

MAILING ADDRESS
530 Carlton Building
Tallahassee, Florida 32304

LOCATION
Cedars Executive Center
2639 North Monroe Street
Tallahassee, Florida

May 19, 1978

MEMORANDUM

TO: Mr. Robert L. Kennedy, Jr.
State Retirement Director

FROM: Larry Gibney
State Retirement Actuary

SUBJECT: Option Election

Attached is a study of the type of option selected at retirement for those individuals retiring during calendar year 1973 through 1977. This includes only members retiring from the Florida Retirement System (FRS, TRS, SCOERS, HP, JRS).

This analysis will serve as a guide as to developing a UNISEX table for option reduction factors. In light

of the recent Supreme Court decision, it is not a question of "if" but "when" we adopt such factors.

I would appreciate any comments you may have.

LJG:pl
cc: Mr. M.T. McNab

RETIRED PAYROLL

Option Election—1973 to 1977

Calendar Year of Retirement		Option 1	Option 2	Option 3	Option 4	Total
1973	Male	$ 932	$ 522	$ 447	$ 227	$ 2,128
	Female	1,414	652	246	76	2,388
	Total	$ 2,346	$1,174	$ 693	$ 303	$ 4,516
		52%	26%	15%	7%	100%
1974	Male	$ 766	$ 458	$ 398	$ 158	$ 1,780
	Female	1,284	607	179	64	2,134
	Total	$ 2,050	$1,065	$ 577	$ 222	$ 3,914
		52%	27%	15%	6%	100%
1975	Male	$ 862	$ 418	$ 454	$ 173	$ 1,907
	Female	1,359	497	212	81	2,149
	Total	$ 2,221	$ 915	$ 666	$ 254	$ 4,056
		55%	23%	16%	6%	100%
1976	Male	$ 1,051	$ 441	$ 486	$ 145	$ 2,123
	Female	1,588	511	246	51	2,396
	Total	$ 2,639	$ 952	$ 732	$ 196	$ 4,519
		58%	21%	16%	5%	100%
1977	Male	$ 1,112	$ 447	$ 478	$ 138	$ 2,175
	Female	1,606	431	233	56	2,326
	Total	$ 2,718	$ 878	$ 711	$ 194	$ 4,501
		60%	20%	16%	4%	100%
1973-1977	Male	$ 4,723	$2,286	$2,263	$ 841	$10,113
		47%	23%	22%	8%	
	Female	$ 7,250	$2,698	$1,115	$ 329	$11,392
		64%	24%	10%	3%	
	Total	$11,973	$4,984	$3,378	$1,170	$21,505
	Percent	56%	23%	16%	5%	100%

Option 1

Calendar Year of Retirement		Number	Monthly Benefit	Average Benefit
1973	Male	932	$245,514	$263
	Female	1,414	434,077	307
1974	Male	766	199,922	261
	Female	1,284	360,543	281
1975	Male	862	223,429	259
	Female	1,359	397,062	292
1976	Male	1,051	288,697	275
	Female	1,588	471,308	297
1977	Male	1,112	$321,616	$289
	Female	1,606	$477,014	$297

Option 2

Calendar Year of Retirement		Number	Monthly Benefit	Average Benefit
1973	Male	522	$147,812	$283
	Female	652	199,597	306
1974	Male	458	121,520	265
	Female	607	179,285	295
1975	Male	418	124,766	298
	Female	497	166,980	336
1976	Male	441	142,964	324
	Female	511	176,892	346
1977	Male	447	160,228	358
	Female	431	154,664	359

(Average Reduction of Option 1 Benefit—Male 6%; Female 2½%—based on members ages 60 through 64)

Option 3

Calendar Year of Retirement		Number	Monthly Benefit	Average Benefit
1973	Male	447	$104,922	$235
	Female	246	71,555	291
1974	Male	398	98,359	247
	Female	179	51,607	288
1975	Male	454	114,221	252
	Female	212	60,894	287
1976	Male	486	137,757	283
	Female	246	74,233	302
1977	Male	478	$152,709	$319
	Female	233	$ 79,150	$340

(Average Reduction of Option 1 Benefit—Male 27%; Female 18%—based on members ages 60 through 64, Female Spouse, 3 years younger; male spouse, 3 years older)

Option 4

Calendar Year of Retirement		Number	Monthly Benefit	Average Benefit
1973	Male	227	$97,276	$429
	Female	76	26,832	353
1974	Male	158	62,818	398
	Female	64	20,422	319
1975	Male	173	78,580	454
	Female	81	27,519	340
1976	Male	145	70,752	488
	Female	51	18,025	353

1977	Male	138	$70,767	$513
	Female	56	$19,300	$345

(Average Reduction of Option 1 Benefit—Male 8%; Female 4.2%—based on members ages 60 through 64, Female Spouse, 3 years younger; male spouse, 3 years older)

STATE OF FLORIDA
Department of Administration

Division of Retirement

MAILING ADDRESS
530 Carlton Building
Tallahassee, Florida 32301

LOCATION
Cedars Executive Center
2639 North Monroe Street
Tallahassee, Florida

May 21, 1981

MEMORANDUM

TO: Mr. Andy McMullian—
State Retirement Director

FROM: L. J. Gibney—State Retirement Actuary

SUBJECT: H. Long—Option Factors—Unisex Table

During our recent discussion of Mr. Long's letter especially with regard to the option factors, it appears to me we should make plans for implementing a "unisex" table by January 1983. We'll need to delay because of outstanding estimates. If we should decide to "bite the bullet" we could inaugurate a "unisex" table beginning September 1981 for estimates.

My reason for suggesting early implementation on our own is to avoid any possible retroactive liability that may arise. As I have mentioned in the past, the "unisex" factors are interpolated values between the present factors, the bases of which is our actual experience. As a result, the male benefit would increase and the female benefit would decrease. If we were forced by a court order to a "unisex" table, it's conceivable we would have to make adjustments back to the date of the Manhart Case which occurred in April 1978. We would have to increase the male benefits but I have my doubts as to whether we would be successful decreasing the female benefits. Hence, there could be a retroactive liability. On the other hand, if unisex factors were used from a certain date forward we would have no problem.

Let's discuss at your convenience.

LJG:mw

cc L. Dennard

* * *

The following are illustrative examples of equivalent benefits payable under Option 3 for males, ages 64 and 66, and females, ages 64 and 66. In all examples, the Option 1 amount, $10,000 per year, is the same whether the member is male or female. The length of service, earned credit and average final compensation are identical for both.

Although the Option 1 benefit is identical in all cases, the equivalent benefits derived for Option 3 are not because the expected future lifetime is materially different between the sexes. Generally, females will live approximately 4 to 6 years longer than males, both being at the same age. This is also reflected in the amount required to guarantee the Option 1 benefits—more money is required if the member is female as opposed to the member being male even though their benefits are identical.

For a male age 66, the amount of money required today to guarantee a benefit of $10,000 per year for life is $94,037. However, when Option 3 is elected with a spouse age 64, the $94,037 will only buy a survivorship annuity of $7,121. If the spouse were older, more of a benefit could be purchased; likewise, if the spouse were younger, less of a benefit would result.

The reduction in benefit to guarantee a continuing benefit to the survivor can be thought of as a "cost of insurance" to fulfill the guarantee. Using the example of a male age 66 and a J.A. age 64, the reduction in benefit is $10,000 less $7,121 or $2,879 per year which can be thought of the amount necessary to guarantee

the continuation of the benefits. On the other hand, if the member were female age 66 and the J.A. age 64, the reduction in benefit would be less ($10,000 – $8,685 or $1,315 per year) since cost of insurance is less for a female member as contrasted to that of a male member.

Another approach is to consider that when a male age 66 retires the Trust sets aside $94,037 to pay for his benefit regardless of how or to whom it is paid. The election of the optional benefits is nothing more than entering into a "wagering" agreement with the Trust and the reduction in benefit is to compensate the Trust because of the introduction of another life or another condition. The reduction is so designed that in the long run with experience unfolding as predicted, the Trust will neither win nor lose, and likewise, the membership will neither win nor lose.

From time to time the argument is presented that if I defer retirement the reduction in benefit should be less because there are fewer years remaining during which a benefit would be payable. What is overlooked, however is that the probability of death increases as age advances and, therefore, the likelihood of paying a continuing benefit increases greatly. As an extreme example, suppose we had two male members 50 and 75 with identical benefits. The spouse of each is the same age.

$10,000 per Year Option 1	Amount Required	Equivalent Option 3	Reduction in Benefit
Male Age 50	$136,779	$8,298	$1,702
Male Age 75	68,110	6,994	3,006

If we change the illustration so that both the members are females whose probability of death is considerably less than the male, the following would result:

$10,000 per Year Option 1	Amount Required	Equivalent Option 3 Male J.A. Age 75	Reduction in Benefit
Female Age 50	$151,317	$9,336	$ 664
Female Age 75	81,988	8,459	1,541

LJG:mw
5/15/81

Trust Assets Required to Pay an Option 1 Benefit of $10,000 per Year for the Lifetime of the Member		Equivalent Annual Benefit Payable Until the Death of the last Survivor (Option 3)		
		Member Male Age	J.A. Female Age	Annual Benefit
		66	55	$6,150
		66	60	6,657
Male Age 66	$94,037	66	64	7,121
		66	70	7,880
		66	75	8,492
		Member Female Age	J.A. Male Age	Annual Benefit
		66	55	$7,831
		66	60	8,313
Female Age 66	$111,636	66	64	8,685
		66	70	9,166
		66	75	9,467
		Member Male Age	J.A. Female Age	Annual Benefit
		64	55	$6,532
		64	60	7,038
Male Age 64	$100,044	64	66	7,724
		64	70	8,200
		64	75	8,749
		Member Female Age	J.A. Male Age	Annual Benefit
		64	55	$8,161
		64	60	8,603
Female Age 64	$117,669	64	66	9,080
		64	70	9,339
		64	75	9,585

Department of Administration

Division of Retirement

MAILING ADDRESS
530 Carlton Building
Tallahassee, Florida 32301

LOCATION
Cedars Executive Center
2639 North Monroe
Tallahassee, Florida
(904) 488-5541

June 25, 1981

Mr. James L. Sublett
Secretary-Treasurer
National Council on Teacher Retirement
275 East Broad Street
Columbus, Ohio 43215

Dear Jim:

This is in reply to your May 7 letter concerning "Unisex" actuarial factors. It would appear that this issue is not going away; consequently, we have done quite a bit of "spade" work thus far.

Following the Manhart decision, our State Retirement Actuary, working closely with our Consulting Actuaries, investigated various methods to develop a "Unisex" table in case we were required by the Legislature or courts to adopt such an actuarial table. The approach that we have settled on which is

reflective of the experience of the Florida Retirement System is to categorize by member age, "unisex" factors using joint annuitant ages 20 years younger to 20 years older. We have statistics of member option election by age, and this provided us with the necessary parameters for interpolation. The end result of it all is that the derived "unisex" factors are averages of the factors we are currently using; the new factor would result in a 5 to 8 percent increase in the male benefit and an 8 to 12 percent decrease in the female benefit, assuming both the member and joint annuitant are the same age.

Listed below are our responses to your specific questions:

1. Since we are not changing the mortality table or the interest assumption for our option factors, the expense of developing our "unisex" factors was quite minimal; actuarial fees of $2,500 plus a computer charge which we absorbed in-house.

2. Based on the assumption there would be a 3-year spread in ages between the member and the joint annuitant, the annual increase in pay-out for our present retirees would be approximately $350,000. The liability increase would be $3.5 million. This represents an increase in our retired payroll of .166% and the liability increase would be .151%. (If we were to assume, however, that female benefits would not be decreased, then the corresponding amounts would be $1.2 million pay-out annually and $12 million for the liability increase. In each—retired

payroll increase and liability increase—the percentage increase would be approximately ½ of 1%.)

3. If we were forced to make retroactive adjustments, the cost would be at least 3 times the amounts cited above, based on the number of years elapsed since April 1978.

We would appreciate any information you may receive from the other states as it would be interesting to compare our approach with others.

Sincerely,

/s/ A. J. McMULLIAN III
A. J. McMullian III
State Retirement Director

AJM/na

Department of Administration

Division of Retirement

LEGAL OFFICE ADDRESS
Cedars Executive Center
2639 North Monroe
Suite 207 C—Box 81
Tallahassee, Florida 32303
(904) 487-1230

July 10, 1981

MEMORANDUM

TO: Mr. Andy McMullian

FROM: Diane K. Kiesling

Re: Use of Sex-Segregated Mortality Tables

Title VII of the Civil Rights Act of 1964 provides that:

> [i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin . . .

In the landmark case, City of *Los Angeles v. Manhart*, 435 U.S. 702, 98 S.Ct. 51 (1978), held that unequal contribution rates used to fund equal benefits.

The Court said that the words "individual" meant that any distinctions must be based on individual differences and not on the accepted concept that women live longer than men. It was argued that the different contributions were based on longevity, not sex. But the Court concluded that "one cannot say that an actuarial distinction based entirely on sex is based on any other factor other than sex. Sex is exactly what it is based on." In the lower court, retroactive relief was awarded, but the Court found such relief to be inappropriate in this case because:

(1) the courts had been silent;

(2) the government agencies had conflicting views;

(3) formally amending a retirement plan is a slow process; and,

(4) major unforeseen contingencies can jeopardize an insurer's solvency and, thus an insured's benefits.

Following *Manhart*, several cases have extended the Title VII protection to cases where contributions are equal, but annuity benefits are unequal because they are calculated based on sex-segregated mortality tables. The conclusion has been that the thrust of *Manhart* envisaged a single rate or unisex rate and that sex differentiated mortality tables are not permissible. *See Equal Employment Opportunity Commission v. Colby College*, 589 F. 2d 1139 (1st Cir. 1978); *Spirit v. Teachers Insurance and Annuity Assoc., et al*, 475 F. Supp. 1298 (S.D.N.Y. 1979); and *Peters, et al v. Wayne State University, et al*, 476 F. Supp. 1343 (S.D. Mich. 1979).

Another case which has serious potential to harm our system is *Norris v. Arizona Governing Committee*, 486 F. Supp. 645 (D. Ariz. 1980). In that case, further payment of benefits calculated under sex distinct mortality tables was enjoined and the court directed that annuity payments to retired females be adjusted to be equal to similarly situated male retirees.

This brings us back to the concept of retroactivity. The reasons for the Supreme Court's denial of retroactive relief in *Manhart* no longer exist and I suspect that retroactivity is going to start showing up in these types of cases in the future (just as it did in *Norris*). The courts are no longer silent and have not been for more than three years. Government agencies charged with applying the law are no longer in conflict. There has been ample time for formal amendment of retirement plans. Solvency problems can be overcome by implementation of an actuarily sound unisex table.

Based on the judicial decisions set forth above, it is suggested by this writer that the Florida Retirement System adopt a unisex actuarial table as soon as practicable. I would further point out that Section 121.091(6)(b) authorizes the administrator to adopt actuarial tables for the purpose of calculating retirement benefits. There is no necessity for legislative action prior to adoption of so-called unisex tables. This change can be achieved solely by amendment of the FRS rules.

Please feel free to call upon me if further information is needed.

DKK:lb

Department of Administration

435 CARLTON BUILDING
TALLAHASSEE, FLORIDA 32301
(904) 438-4116

September 1, 1981

Memorandum

TO: David V. Kerns

FROM: Samantha Boge

RE: Adoption of Unisex Actuarial Tables

After reviewing the series of articles provided by the Division of Retirement as well as the landmark decision in *City of Los Angeles v. Manhart*, 98 S. Ct. 51 (1978), I can only conclude that the Division would be well advised to convert from sex-distinct actuarial tables to unisex tables as soon as is practical.

As you know, the *Manhart* decision specifically only disapproved of an employer's requirement that females make larger monthly contributions to a retirement system than their male counterparts. Equal monthly benefits were received by male and female retirees. Of course, the employer relied on sex-distinct actuarial tables in arriving at the requirement of unequal contributions. The Court in *Manhart* reasoned that an individual woman could not be treated differently from other (male) employees simply on the basis of a forbidden

classification—namely sex—even though the assumed generalization about that class of persons was true. In other words, the simple fact that women as a class live longer than men is no justification for an employer to treat an individual woman employee differently than a man similarly situated. After all, women who smoke, drink or have high pressure jobs may possess a far shorter lifespan than an average male. Title VII requires that *individual* employees be treated equally without regard to their race, sex, etc.

Using sex-distinct actuarial tables resulting in higher monthly benefits for female retirees and their families than male retirees receive violates Title VII in my opinion, as surely as unequal monthly employee contributions. While such use may be permissible by insurers generally, it is not permissible by employers like the State of Florida.

I feel constrained to raise one final issue as a result of the Supreme Court's admonition to treat every employee as an individual. Is it only a matter of time until actuarial tables, unisex or not, using age as a factor, are forbidden by Courts interpreting the various Civil Rights laws? As you know Florida law includes age as a forbidden basis for discrimination in the employment arena. Seemingly, basing retirement benefit amounts on age would thus be impermissible for an employer.

SB/ss

Supreme Court, U.S.
FILED
JUN 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1852

In The

Supreme Court of the United States

October Term, 1986

HUGHLAN LONG, S. Dewey Haas, and Carl Rassler, individually and on behalf of all retired and present male employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, as well as the surviving joint annuitants of any deceased retired male employees,

Cross-Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Cross-Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

CHARLES T. COLLETTE
Counsel of Record
DOUGLAS A. MANG
BRUCE A. MINNICK
MANG, RETT & COLLETTE, P.A.
Post Office Box 11127
Tallahassee, Florida 32302
(904) 222-7710

AUGUSTUS D. AIKENS, JR.
General Counsel
Florida Department of Administration
435 Carlton Building
Tallahassee, Florida 32399-1550
(904) 488-4747

Attorneys for Cross-Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Defendants/cross-respondents perceive no need to restate the "Questions Presented for Review" by plaintiffs/cross-petitioners.

PARTIES TO THE PROCEEDING

Defendants/cross-respondents adopt their statement of the "Parties to the Proceeding" set forth at pp.iii-v in their initial "Petition for Writ of Certiorari" (Sup. Ct. No. 86-1685) filed April 21, 1987. The only difference is that in this matter defendants are cross-respondents and plaintiffs are cross-petitioners, while in the initial matter (No. 86-1685) defendants are petitioners and plaintiffs respondents.

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PREFACE REGARDING PARTY AND RECORD REFERENCES

In this brief defendants will adopt and use the same method of party and record references which they used in their initial "Petition for Writ of Certiorari" (No. 86-1685) filed April 21, 1987, and which is detailed at pp. xi-xii of that initial petition.

Additionally, the cite herein of "A—" followed by a page number (e.g., "A128") refers to the appendix to defendants' initial petition for writ of certiorari in Case No. 86-1685. Should it be necessary to refer to the appendix to plaintiffs' cross-petition in the instant matter, such will be cited by the use of "PA—" followed by a page number (e.g., "PA121").

No. 86-1852

In The

Supreme Court of the United States

October Term, 1986

HUGHLAN LONG, S. Dewey Haas, and Carl Rassler, individually and on behalf of all retired and present male employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, as well as the surviving joint annuitants of any deceased retired male employees,

Cross-Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Cross-Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Defendants/cross-respondents State of Florida, *et al.*, respectfully request this Court deny the cross-petition for writ of certiorari seeking review of the 11th Circuit's decision in this case reported at 805 F.2d 1542 (1986), *reh. denied*, 805 F.2d 1552 (1987).

OPINIONS BELOW

The parties are in agreement as to opinions below. *See also* p.1 of defendants' initial petition for writ of certiorari (Sup. Ct. No. 86-1685) filed April 21, 1987.

JURISDICTION

The parties are in agreement as to jurisdiction. *See also* p.2 of defendants' initial petition (No. 86-1685).

STATUTES INVOLVED

Defendants agree with plaintiffs' listing of the statutes involved, except that defendants do *not* agree the Equal Pay Act of 1963 as amended, 29 U.S.C. § 206(d)(1), is involved in this case.

Specifically, the Equal Pay Act is not involved in this case because plaintiffs never raised an Equal Pay Act claim in the district court. *See generally* plaintiffs' initial complaint (R1-1-1 to 9), first amended complaint (R1-15-1 to 9), and second amended complaint upon which this matter ultimately proceeded (R4-55-3 to 11). *See also* the parties' district court pretrial stipulation which is set forth in the appendix to defendants' initial petition (specifically, at A93-A97, A118, and A118-A120).

Defendants further submit the additional statutes identified as involved at pp.3-4 in their initial petition (No. 86-1685) are also here involved and, accordingly, here adopt their statement of the "Statutes Involved" set forth at those pages of their initial petition.

STATEMENT OF THE CASE

Because plaintiffs' statement of the case fails to provide the full picture of what occurred, defendants here provide a more complete picture—even though the issue of bad faith would appear to be irrelevant.

At the outset the Court should note that the "principals" referred to in the district court's March 31, 1986 order (*see* A65; *see also* PA63) were defendant Smith, the Secretary (i.e., chief executive officer) of the State's Department of Administration at the time of the events complained of in this lawsuit and an initially named defendant in the trial court (*see* defendants' April 21, 1987 initial certiorari petition (Sup. Ct. No. 86-685) at p.iii n.2), and defendant McMullian, the Director (i.e., chief executive officer) of the Division of Retirement in the State's Department of Administration (*see* defendants' initial petition at p.iii).

The Court should also initially note that the conflict among federal regulations which it referenced in *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 720 n.37 & 714 n.26 (1978) ("*Manhart*"), became a reality in this case with respect to the Florida Retirement System ("FRS").

Specifically, in October and November of 1978 two charges were filed with the civil rights division of the then U.S. Department of Health, Education & Welfare ("HEW") asserting the FRS, in the payment of its optional joint-annuitant retirement benefits, discriminated against males under Title IX of the Education Amendments of 1972 (*see* D.Exs. 1 & 2; *see also* R18-81 to 82).

Those charges were apparently filed by employees of or retirees from the Pinellas County School Board and specifically asserted that, because of the application of sex-based actuarial factors in the calculation of the FRS' optional joint-annuitant benefits which resulted in males receiving smaller monthly retirement benefits than similarly situated females, males suffered unlawful discrimination under Title IX (D.Ex. 5).

In November 1979 HEW found under 45 C.F.R. § 86.56 (b)(2) of its Title IX regulations that, because the FRS exacted equal contributions from or on behalf of similarly situated males and females, the State did not discriminate in its payment of lower optional joint-annuitant benefits to males as contrasted with similiarly situated females (D.Ex. 5). The State interpreted this to mean that they could "go on and proceed what they were doing" (R18-82, lines 17-18) — that at least for the purposes of Title IX the State's use of sex-based mortality tables in the calculation of the FRS' optional joint-annuitant retirement benefits "was not discriminatory" (R18-84, lines 24-25, & R18-85, lines 1-2—testimony of defendant Smith).

Preliminaries aside, defendant Smith (now Vila—see defendants' initial petition (No. 86-1685) at pp.iii n.2 & xi n.5) was chief executive officer of the State's Department of Administration ("DOA") from July 1979 to January 1985 (R18-74). He was fully aware of *Manhart* and over a five to six year period repeatedly readdressed the issues raised thereby (R18-74 to 77). Indeed, DOA went to the Florida Legislature every year from 1979 through 1983 on the unisex issue (*e.g.*, R18-77 & 86; R19-5 to 6; R21-132).

The 1979 Florida Legislature responded by amending *Fla. Stat.* § 112.66 (1978 Supp.) to provide in subsection (9) thereof, *see Fla. Stat.* § 112.66(9) (1979) (A128):

> No [Florida government pension] plan shall discriminate in its benefit formula based on color, national origin, sex, or marital status. Nothing herein shall preclude a plan from actuarially adjusting benefits or offering options based on sex, age, early retirement, or disability.

(*e.g.*, R19-76 to 77 & R19-143 to 144). Subsequent Legislatures did not feel compelled to deal with the issue (R19-5 to 6; R18-95 to 96). Moreover, and in point of fact, the 1983 Legislature was provided with a comprehensive and detailed internal staff briefing memo on this unisex retirement benefit issue in February 1983 (D.Ex. 9) which concluded that "[t]he issues regarding the use of sex-linked mortality tables in the calculation of retirement benefits are still very much unresolved in the wake of *Manhart*" (D.Ex. 9-15).

In any event, defendant Smith repeatedly sought and received advice from his staff on the unisex issue (R18-78 to 83). His chief legal advisor, former DOA general counsel David V. Kerns who is a noticed unnamed class member herein appearing on his own behalf (*see* R18-147 to 148; *see also* defendants' initial certiorari petition (No. 86-1685) at pp.iv-v), was of the opinion that *Manhart* was not controlling and did not require the FRS to convert to unisex mortality tables for the calculation of its three optional joint-annuitant benefits (*see* R18-78 to 80; *see also* R18-148 to 151, 163, & 166 to 167). As a result of a query by Mr. Kerns, a junior attorney on his staff (Samantha Boge) prepared a memo dated 9/1/81 on the uni-

sex issue stating, among other things, that in her opinion the FRS had to convert to unisex (D.Ex. 14, PA127-PA 128).[1] However, Mr. Kerns did not agree with Ms. Boge's memorandum or its conclusion, as it did not explain away the distinguishing factors with which he was concerned (R18-153). Defendant Smith never saw Ms. Boge's memo (R18-109 to 110).

The State's consulting actuaries (Tillinghast, Nelson & Warren) likewise advised *Manhart* did not require the State to move to unisex tables for calculation of the FRS' optional joint-annuitant retirement benefits because the FRS' first and primary single life benefit was not based on sex (R18-80). Their advice in this regard (per Michael Tierney, who was the State's testifying actuarial expert at the February 1986 trial in this matter) was based on their "opinion that the *Manhart* decision did not address optional factors" in any retirement plan (*see* R19-172 & 198; *see also* R20-9 to 11).

Similarly, defendant McMullian was intimately involved in the *Manhart* discussion and did not feel *Manhart* was controlling on the FRS (R18-188; R18-80) for much the same reasons that Mr. Kerns did (R19-44). The opinion of Mr. McMullian's chief legal advisor, Augustus Aikens,[2] was the same (R18-188). A junior attorney un-

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[1]This is the same memorandum which plaintiffs refer to and partially quote at pp. 9-10 in their cross-petition for certiorari.

[2]Mr. Aikens subsequently was promoted from chief legal advisor for the Division of Retirement within the State's Department of Administration ("DOA") to general counsel (i.e., chief legal advisor) for DOA. Note that Mr. Aikens appears as co-counsel on this brief as well as on the State's initial certiorari petition (No. 86-1685).

der Mr. Aikens (Diane Keisling) provided Mr. McMullian with a memo dated 7/10/81 expressing her opinion that *Manhart* compelled the FRS to convert to unisex (D.Ex. 16, PA124-PA126).[3] Just as Mr. Kerns with respect to the Boge memo above referred to, neither Mr. McMullian nor Mr. Aikens agreed with the conclusion reached by Ms. Keisling in her memo (R18-189 to 191). Indeed, not only did Mr. Aikens disagree with Ms. Keisling's memo, he represented the State in plaintiff Long's unsuccessful appeal to the Florida 1st District Court of Appeal, *see Long v. Dep't of Administration, Div. of Retirement,* 428 So.2d 688 (Fla. 1st DCA 1983), as well as in the administrative proceedings giving rise thereto (*see* R3-47-1 *et seq.* & R4-74-1 *et seq.*), and appears as co-counsel in the instant matter (*see* n.2 herein *supra*). Defendant Smith also never saw Ms. Keisling's memo (R18-109 to 110).

It should also be noted that during this same time frame the opinions expressed in national publications which were reviewed by Mr. McMullian were likewise to the effect that *Manhart* was not controlling (*e.g.,* R19-92).

With the exception of a June 25, 1981 letter by defendant McMullian (P.Ex. 40, PA121-PA123) (*see* plaintiffs' cross-petition at p.9), the only other memoranda focused upon by plaintiffs in their cross-petition (*see* cross-petition at pp.7-9) were three of several written by Lawrence Gibney, the Division of Retirement's in-house actuary (P.Ex. 20, PA101-PA108; P.Ex. 21, PA109-PA114; P.Ex. 25, PA115-PA120). However, Mr. Gibney wrote two

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[3]This is the same memorandum which plaintiffs refer to and partially quote at p.9 in their cross-petition.

other memoranda (P.Ex. 22; P.Ex. 23)[4] to which plaintiffs do not refer. Moreover, the only other memoranda extant in this case on the unisex issue are those of Mr. Gibney, and plaintiffs fail to point out that Mr. Gibney's memoranda are not so unequivocal as they submit, especially when taken as a whole (*see generally* P.Exs. 20-25) and especially when placed in the context of Mr. Gibney's February 1986 trial testimony (*see* R21-3 to 59). Furthermore, Mr. Gibney maintained the view that *Manhart* neither compelled nor provided clear direction for the State to convert to unisex mortality tables for the calculation of its optional joint-annuitant benefits (*see* R21-22 to 25, 28 to 29, & 58 to 59).

Within this context note that the opinions of Mr. Gibney were relayed to Secretary Smith[5] through Mr. McMullian (R18-79). At best it can be said Mr. Gibney was somewhat prescient, for his opinion was that someday the use of unisex tables would be mandated for optional retirement benefits although such was *not* mandated by *Manhart* (*see* R18-79 to 80; *see also* R21-22 to 25, 28 to 29, & 58 to 59). Additionally, he conducted a survey which established as of June 1979 that, of 29 state retirement plans responding, only six had converted to unisex tables for the calculation of retirement benefits (*see* D.Ex. 19 or P.Ex. 3; *see also* P.Ex. 24).

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[4]The dates of these memoranda are, respectively, August 9, 1978 (P.Ex. 22), and November 25, 1978 (P.Ex. 23).

[5]See defendants' initial April 21, 1987 petition (No. 86-1685) at xi n.5 & p.iii n.2.

Subsequent to each and every one of the memoranda/letters which plaintiffs herein assert create the "bad faith" issue and, indeed, subsequent to every unisex memorandum/letter in evidence in this case (with the exception of D.Ex. 9, the 1983 Florida Legislature's staff briefing memo), among other times the unisex issue was explored in great detail at a meeting on September 4, 1981, involving defendants Smith and McMullian as well as Mr. Kerns, Mr. Aikens, Mr. Gibney, and Lou Dennard (who was Mr. McMullian's assistant retirement director) (R18-87 to 90, 141 to 142, & 194 to 195; R21-34 to 35 & 48). The consensus arrived at in that meeting was that *Manhart* was not controlling, that there was no clear direction for the FRS to go to unisex tables for the calculation of its optional benefits, let alone how it properly and legally might do so (*Ibid*), and that the matter should be taken back to the Florida Legislature[6] which, as already noted above (*see* herein *supra* at pp.4-5), took no action.

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REASONS FOR DENYING THE WRIT

I. Question 1

Notwithstanding plaintiffs' assertions of conflict with decisions of this Court because the lower courts herein refused to order topping up of benefits beyond the unisex level, in point of legal fact there is none—not with this Court's applicable decisions and not with circuit court decisions which have addressed the issue. Moreover, even if there were conflict, plaintiffs have in no way come

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[6]At this point in time, the next session of the Florida Legislature would have been Spring 1982.

close to demonstrating the requisite "abuse of discretion" which is the standard of review they must meet in order to succeed on this point. *See, e.g., Norris v. Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans,* 796 F.2d 1119, 1121 (9th Cir. 1986), *appeal following remand from,* 463 U.S. 1073 (1983) (*"Norris II"*); *Cox v. American Cast Iron Pipe Co.,* 784 F.2d 1546, 1562 (11th Cir. 1986).

In *Manhart, supra* 435 U.S. at 719 n.36, this Court gave clear indication that relief only to the unisex mortality table level should be that which is considered in a Title VII pension case. In *Norris,*[7] 463 U.S. at 1111 n.4, Justice O'Connor also clearly indicated that relief in a Title VII pension benefit case such as this should not be beyond the unisex mortality table level. Moreover, in his *Norris* dissent on the non-retroactive liability issue Justice Marshall (joined by Brennan, White, and Stephens) was quite clearly considering the award of retroactive relief only up to the sex-neutral (i.e., unisex) mortality table level, *Id.* 463 U.S. at 1093-95.

Moreover, the one circuit which has squarely addressed the issue is the 9th Circuit in *Norris II,* in the appeal following this Court's 1983 *Norris* remand.[8] Therein the 9th Circuit affirmed that the award of relief to the

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[7]*Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris,* 463 U.S. 1073 (1983) (*"Norris"*).

[8]*Norris v. Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans,* 796 F.2d 1119 (9th Cir. 1986), *appeal following remand from,* 463 U.S. 1073 (1983) (*"Norris II"*).

unisex mortality table level was all that was required, *Id.* 796 F.2d at 1121-22.

As for plaintiffs' Equal Pay Act argument, they raised no Equal Pay Act claim in the trial court (*see* "Statutes Involved" herein *supra* at p.2). At best they have an argument under the Bennett Amendment, 42 U.S.C. § 2000e-2(h). But *Norris II, supra* 796 F.2d at 1123-24, again disposes of plaintiffs' argument without conflict, as does Justice O'Connor's concurrence in *Norris, supra* 463 U.S. at 1111 n.4. Further, even if plaintiffs had raised an Equal Pay Act claim in the district court, the 9th Circuit's decision in *Probe v. State Teachers' Retirement System,* 780 F.2d 776, 783-84 (9th Cir.), *cert. denied,* — U.S. —, 90 L.Ed.2d 978 (1986) (*"Probe"*), would nevertheless completely dispose of plaintiffs' argument again without conflict.

In short, there is no conflict on this issue—not with the applicable decisions of this Court and not with the applicable decisions of the circuit courts. Indeed, just the contrary is true. On this issue the decisions below fully comport with applicable precedent on the matter. In other words, plaintiffs simply have not met the standards of Supreme Court Rule 17 which would justify the grant of review and, accordingly, review must be denied.

II. Question 2

With respect to the issue of "bad faith", the decisions below turn on the facts of this case (*see* "Statement of the Case" herein *supra* at pp.2-9; *see also* plaintiffs' "Statement of the Case" in their cross-petition at pp. 3-13). Resolution of the bad faith issue, if it even be rele-

vant, will affect no one but the litigants in this case. Indeed, the issue does *not* even involve an important question of federal law.

Moreover, plaintiffs have an erroneous view as to the relevance and importance of bad faith. Plaintiffs assume that if they can establish bad faith such will entitle them to additional relief in the nature of punitive damages. However, plaintiffs fail to focus on the fact that this is exclusively an action under Title VII which authorizes only equitable relief, *e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 442-47 (1975) (Rehnquist, J., concurring), and that even the award of backpay under Title VII is in the nature of equitable restitution rather than damages, *Ibid.* Equity allows only a "make whole" remedy—it never has and does not authorize the award of punitive damages. As the district court awarded more than equity would allow as a matter of law (*see* Parts I., II.A, & II.B. under "Reasons for Granting the Writ" in defendants' initial April 21, 1987 certiorari petition (No. 86-1685) at pp. 14-21), there is no basis in the law of equity for urging that the district court should have awarded even more than it did. Thus the issue of bad faith is irrelevant.

However, be such as it may (and regardless of plaintiffs' contentions), the standard of review is that of "clearly erroneous" as the 11th Circuit correctly noted, 805 F.2d at 1550 (A19, PA20-PA21). With respect to the finding of no bad faith, such is analogous to a finding of no intent to discriminate, and in this case such finding of lack of bad faith is manifestly not clearly erroneous (*see* "Statement of the Case" herein *supra* at pp.3-9). Indeed, that finding and its affirmance are entirely in

accord with this Court's decision in *Pullman-Standard v. Swint,* 456 U.S. 273, 276 & 287-93 (1982).

Further, and for whatever relevance such may have, it should also be briefly noted that this Court's statement in *Albemarle, supra,* 422 U.S. at 422,[9] upon which plaintiffs base their argument, was not a holding in that case. While the statement may be true in a broad general sense, in the context of *Albemarle* the statement is dictum, for therein the district court's finding of no bad faith was not challenged. Additionally, this Court remanded *Albemarle* for further determination of whether the award of backpay might nevertheless be barred because of the particular facts of that case, *Id.* 422 U.S. at 423-25.

Moreover, the 11th Circuit's affirmance of the trial court's finding of lack of bad faith was entirely in accord with its own precedent, *see Intern'l Food & Beverage Systems v. City of Ft. Lauderdale, Fla.,* 794 F.2d 1520, 1526 (11th Cir. 1986), as well as that of other jurisdictions, *e.g., Kalvar Corp. v. United States,* 543 F.2d 1298, 1301-02 (Ct. Cl. 1976), *cert. denied,* 434 U.S. 830 (1977).

In short, the district court's finding of no bad faith was not clearly erroneous, and the 11th Circuit correctly recognized this. There is no conflict nor any important

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[9]To quote in pertinent part:

> When an employer *has* shown bad faith—by maintaining a practice which he knew to be illegal or of highly questionable legality—he can make no claims whatsoever on the Chancellor's conscience. [Emphasis by this Court.]

federal question. Accordingly, review must again be denied.

III. Question 3

Again, and despite plaintiffs' contentions, there is no conflict. The district court's only error was awarding any relief of any kind to the pre-*Manhart* retirees[10] in this case (*see* Part II.A. under "Reasons for Granting the Writ" in defendants' initial certiorari petition (No. 86-1685) at pp.18-20)—not in failing to award them retrospective adjustment of benefits in addition to prospective adjustment of benefits.

Plaintiffs' urging that additional relief be awarded the pre-*Manhart* retirees herein is an argument that this Court create additional conflict with its *Norris* decision as well as the 9th Circuit's decision in *Retired Public Employees' Ass'n of California v. State of California*, 799 F.2d 511 (9th Cir. 1986) (*again see* Part II.A. under "Reasons for Granting the Writ" in defendants' initial certiorari petition at pp.18-20)—it is not an argument that this Court resolve existing conflict. In essence, plaintiffs urge hereunder that this Court depart from the principles of stare decisis and adherence to previous precedent.

Again plaintiffs have come nowhere close to meeting the standards of Supreme Court Rule 17 which would justify the grant of review and, accordingly, review must again be denied.

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[10]*See* defendants' initial April 21, 1987 certiorari petition (No. 86-1685) at p.6 & n.10.

CONCLUSION

Because the questions raised by plaintiffs present no conflict with decisions of other federal courts of appeals on the same subject matter, no conflict with applicable decisions of this Court, and no important questions of federal law which have not been but should be settled by this Court, defendants/cross-respondents respectfully request that plaintiffs' cross-petition for writ of certiorari be denied.

Respectfully submitted,

CHARLES T. COLLETTE
Counsel of Record
DOUGLAS A. MANG
BRUCE A. MINNICK
MANG, RETT & COLLETTE, P.A.
Post Office Box 11127
Tallahassee, Florida 32302
(904) 222-7710

AUGUSTUS D. AIKENS, JR.
General Counsel
Florida Department of
Administration
435 Carlton Building
Tallahassee, Florida 32399-1550
(904) 488-4747

Attorneys for
Cross-Respondents

June 1987